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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, for and on behalf of its affected members,

Petitioners,

vs.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, *et. al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GERARD C. SMETANA,
Suite 1400
33 North Dearborn Street
Chicago, Illinois 60602
WILLIAM H. DUROSS, III
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner.

LAURENCE B. KRAUS,
General Counsel
CHAMBER OF COMMERCE OF
THE UNITED STATES OF
AMERICA,
1615 H. Street, N.W.,
Washington, D.C. 20006,

Of Counsel:
LAW OFFICES OF
GERARD C. SMETANA
Suite 1400
33 North Dearborn Street
Chicago, Illinois 60602
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

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Petitioners,

vs.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, ***et. al.,***

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Chamber of Commerce of the United States of America, on behalf of its affected members ("the Chamber"), hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the decree of United States District Court for the Northern District of California.

ORDERS AND OPINIONS BELOW

The opinion and judgment of the Court of Appeals (Pet. App.I)[1] is reported at 608 F.2d 1319. The decision of the

[1] "Pet.App." refers to the Appendix attached to the instant petition.

District Court (Pet.App.II) granting Legal Aid Society of Alameda County et al's motion for partial summary judgment is reported at 381 F.Supp. 125. The order of the District Court is unreported. (It is reproduced in full in Pet.App.III). See also reference to District Court "Decree" in Opinion of Court of Appeals at 608 F.2d at 1339 (fn. 39), 1340 (fn. 40 and 41), (Pet.App. A-32—A-34).

JURISDICTION

The judgment of the Court of Appeals (Pet.App. A-103) was entered on December 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether racial hiring quotas can be imposed upon government contractors in the enforcement of regulations promulgated by the Department of Labor under color of Executive Order 11246 to achieve a designated ratio of minority employees absent a prior finding of racial discrimination.

2. Whether regulations promulgated by the Department of Labor as applied by the courts below which in fact impose minority hiring quotas and create a racial preference violate the Fifth Amendment to the United States Constitution, Title VII of the 1964 Civil Rights Act and are contrary to Executive Order 11246.

3. Whether the Office of Federal Contract Compliance Programs in applying its mandate of affirmative action in employment is necessarily bound by federal equal employment policy set forth in Title VII of the 1964 Civil Rights Act.

4. Whether underutilization can properly be predicated upon work force disparities mirrored by general population percentages without regard to relevent job skills and their availability in the labor market.

STATUTE, ORDERS AND REGULATIONS INVOLVED

The relevant provisions of Section 703 of Title VII of the 1964 Civil Rights Act, as amended (78 Stat. 241, 86 Stat. 103, 42 U.S.C. §§ 2000e-2000e-15) are as follows:

> (a) It shall be unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

> (d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d).

> (j) Nothing contained in this subchapter shall be interpreted to require any employer . . . labor organization, or joint labor management committee subject to this subchapter to grant preferential treatment to any individual to or any group because of their race, . . . on account of an imbalance which may exist with respect to the total number or percentage of

> persons of any race . . . in comparison with the total number or percentage of persons of such race, . . . in any community, state, section or other area, or in the available work force in any community, state, section, or other area.

Executive Order 11246 and Revised Order Number 4, 41 C.F.R. § 60-2.1—60-2.11 (hereinafter referred to as Revised Order Number 4) are set forth in Petitioners' Appendix IV and V respectively.[2]

STATEMENT

I.

THE CAUSE OF ACTION

In February 1973, Legal Aid filed a complaint in the nature of mandamus against officials of all federal compliance agencies alleging, *inter alia*, that the federal defendants had failed to enforce Executive Order 11246 by approving affirmative action programs of contractors which allegedly did not comply with the requirements set forth in Revised Order Number 4. Named as specific defendants were the Secretary of Labor, the Director of OFCCP, the Secretary of Agriculture, and the Chief of the Contract Compliance Division of the Agriculture Department's Office of Equal Opportunity. No federal contractors were named as defendants and, although four unemployed minority persons were named as plaintiffs who allegedly sought employment and claimed to have been denied employment from contractors within the compliance jurisdiction on the basis of race and/or sex, no claim against any specific contractor was alleged. Rather, Legal Aid sought to compel the federal defendants to conduct affirmative action compliance reviews in strict conformity with Revised Order No. 4, to restrain defendants from approving "non-complying"

[2] Technical Guidance Memo No. 1 is the instruction by OFFCP to field personnel for administering Revised Order No. 4 (See Pet. App. A-96 for current status of Technical Guidance Memo No. 1).

affirmative action programs, to rescind approval of "non-complying" programs, and to seek debarment and other sanctions against any contractor which did not implement hiring goals and timetables.

Pursuant to agreement between the parties, the federal defendants submitted to Legal Aid the affirmative action programs of 29 Alameda County contractors approved during 1972-1973. Legal Aid filed a memorandum with exhibits claiming that these 29 approved affirmative action programs violated Revised Order Number 4 in that the programs contained inadequate utilization analyses of each job category in reference to minorities and women and failed to establish adequate goals and timetables to correct underutilization by specific reference to the percentage of women and minority workers in the job group as compared to their percentage in the applicable labor market. The federal defendants filed no response to the memorandum. Thereafter, Legal Aid filed a motion for partial summary judgment on this portion of its complaint.

II.

THE ORDERS AND OPINIONS BELOW

A. The Order And Decree of the District Court

The Federal District Court granted Legal Aid's motion. Specifically, the Court relied upon Revised Order Number 4 and Technical Guidance Memo No. 1 to reject the federal defendants' contention that "ultimate goals" are not required in establishing goals and timetables (Pet.App. A-63). The Court further concluded that "glaring inadequacies" in correcting utilization deficiencies "cannot be explained away by defendant[s]' fear that percentage goals would impose inflexible and illegal quotas on the contractors" (Pet.App. A-65). The Court further found on the basis of Legal Aid's unopposed memo-

randum that 10 affirmative action programs programs had been approved in violation of Revised Order Number 4 and ordered the federal defendants to rescind their prior approval (Pet.App. A-69). The federal defendants were further enjoined from approving affirmative action plans not in compliance with Revised Order Number 4, and to seek sanctions against any contractor failing to so comply (*Id.*).

The federal defendants withdrew a notice of appeal (Pet.App. A-6). The Chamber's motion to intervene on behalf of its affected members was denied except as to appeal rights.

The District Court ordered the following affirmative relief (Pet.App. A-71—A-72):

> (b) Each program must contain goals and timetables which satisfy each of the following requirements:
>
> (i) An ultimate goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The ultimate goal must be stated as a percentage of the total employees in the job group and must be at least equal to the percentage of minorities or women available for work in the job group in the labor market.
>
> (ii) For each job group in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.
>
> (iii) For each job group in which underutilization exists, the contractor must establish rates for hiring or promoting the minorities and women. The rates must be stated as a percentage of new placements in the job group, and they must remain in effect (unless specifically modified on the basis of subsequent data) until the underutilization is completely corrected. The percentage rates must be the maximum rates that can be achieved through the contractor's putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentages set in the ultimate goals. Numerical goals based on projected openings are permissible but cannot be used in place of percentage rates.

B. The Decision of the Court of Appeals

The Ninth Circuit affirmed the District Court's fact findings, its judgment and its decree, with one modification (Pet.App. A-6, A-41).[3] The Court of Appeals rejected certain procedural arguments advanced against Legal Aid's mandamus action. These procedural objections are not advanced here.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The decisions below require federal contractors to involuntarily establish and adhere to a fixed percentage of minority or women employees based upon a numerical imbalance of such workers in a broadly defined "labor market" for each job classification where "underutilization" exists. The District Court's decree specifically requires contractors to establish fixed percentage "rates for hiring or promoting of minorities" (Pet.App. A-72). This fixed percentage is a quota requirement. As the Court of Appeals stated (Pet.App. A-35): "The regulations do not explicitly require that ultimate goals be fixed, but they do so by inescapable implication."

Since a federal contractor must reach this established percentage or remain non-compliant (Pet.App. A-72—A-73) and, thus subject to sanction, this quota is inflexible and fixed. The Court of Appeals in affirming the District Court's decision below further limited the contractors "good faith" flexibility set forth in Revised Order No. 4 as applicable only to the establishment of the goal *not* to its achievement (Pet.App. A-38-A-39).

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[3] In view of the lengthy period of elapsed time, the Court of Appeals held moot the District Court's order requiring the federal defendants to withdraw approval of the affected contractors' 1972-73 affirmative action programs (Pet.App. A-11).

The predicate for this mandatory requirement here is not judicially or administratively determined past discrimination against any specific individuals by any of the 29 contractors contracting with the federal defendants. Indeed, the relief imposed is independent of any requirement that specific victims of discrimination even be identified. Rather, this required preferential treatment for minority and women applicants not themselves the victims of discrimination is based solely upon numerical disparity between utilization of such workers in a job category (irrespective of actual applicants or job openings) and an arbitrary percentage of such prospective applicants in a general population labor market regardless of skills or any consideration of other factors in neutral hiring decisions.

This petition then presents the questions whether section 703(j) of Title VII and the Fifth Amendment to the U.S. Constitution prohibits the judiciary and the government at the request of third parties from directing government contractors to adhere to hiring preferences, based solely on race, to overcome alleged underrepresentation of minorities in the work place; and whether the evidentiary standard of discrimination under Title VII applies to Executive Order 11246.

II.

THE QUESTIONS PRESENTED ARE OF PARAMOUNT SIGNIFICANCE TO FEDERAL NONDISCRIMINATION POLICY

This petition presents one of the questions reserved by the Court four years ago in *McDonald* v. *Santa Fe Transp. Co.*, 427 U.S. 273, 280-81 n. 8 (1976) and not resolved last Term in *Steelworkers* v. *Weber*, 443 U.S. 193 (1979)—that is the permissible scope of judicially required affirmative action imposed under Title VII, The Fifth Amendment or Executive Order 11246. This question is purely legal and first requires discerning Congress' intention with respect to federally imposed involuntary affirmative action.

This Court has not yet held that Title VII or Executive Order 11246 grants authority to award preferential hiring treatment to persons not actually the victims of race or sex discrimination. Section 703(j) of the 1964 Civil Rights Act expresses an unequivocal legislative judgment to prohibit hiring preferences based solely upon race or sex. The authority of federal compliance agencies under the Executive Order to require preferential hiring quotas absent a finding of unlawful discrimination is precluded by this expression of legislative will. While the Executive Order may be validly promulgated upon the President's procurement authority, the Executive Order cannot be applied in a manner which directly conflicts with the express will of Congress. Otherwise the precarious equilibrium between the three coordinate branches of our constitutional system is placed in jeopardy. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 638 (1952).

The legislative history of the enactment of Title VII in 1964 and of its amendment in 1972 demonstrates that Congress intended affirmative action under the Executive Order to be applied consistently with Title VII.[4] At the time Congress considered limiting the scope of affirmative action under the Executive Order, affirmative action under Title VII was applied and sparingly at that to remedy past discrimination not numerical imbalances. In rejecting a proposal in 1972 to amend section 703(j) to proscribe *all* affirmative action programs

[4] Both the Executive Order and Title VII put great emphasis upon voluntary remedial action and conciliation rather than upon preferential hiring quotas which may exacerbate group consciousness and racial stereotyping. As Professor Gellhorn has noted:

> [T]he fundamental goal of [agencies encouraging fair employment practices] has been to improve group relations and reconcile differences. The operating assumption has been that discrimination can be eradicated only by eliminating its causes: ignorance and historical barriers to contact. Open informational avenues directly achieve these ends. (footnote omitted). Gellhorn, "Adverse Publicity by Administrative Agencies," 86 Harv.L.Rev. 1380, 1398 (1973). See also *Farmer* v. *Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964).

under the Executive Order, the Senate desired at most to preserve the existing case law under Title VII and the Executive Order that race conscious remedies could be fashioned "to remedy clearly proven cases of discrimination." 118 Cong.Rec.S. 705 (remarks of Sen. Williams); see also 118 Cong. Rec.S. 693-94 (remarks of Sen. Javits).[5]

As Mr. Justice Powell stated in *Regents of the University of Cal.* v. *Bakke,* 438 U.S. 265, 301-302 n. 40 (1978): "Every decision upholding the requirement of preferential hiring under the authority of Exec. Order No. 11246 . . . has emphasized the existence of previous discrimination as a predicate for the imposition of a preferential remedy." And (438 U.S. at 302): "[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations (footnote omitted)." By analogy to the express prohibition against racial preference in admission policy in section 601 of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), petitioner contends that racial preference in hiring under the Executive Order is precluded by section 703(j) of the same Act. Cf. *Regents* v. *Bakke, supra.,* 438 U.S. at 408-421 (Opinion of Mr. Justice Stevens).[6] Indeed, even in Title VII cases where past discrimination against specific minority victims has been judicially determined, and upheld on appeal, this Court has been acutely sensitive to the impact affirmative remedies may have upon innocent nonminority employees and job applicants. See, e.g., *Teamsters* v. *United States,* 431 U.S. 324, 347-48 (1977); *McDonald* v. *Santa Fe Transp. Co., supra,* 427 U.S. at 278-80; *Franks* v. *Bowman Transp. Co.,* 424 U.S. 747, 762 (1976).

[5] For the view that Congress intended to outlaw all preferential treatment based on race, see Comment, 60 Iowa Rev. 693, 697-703 (1975); Comment, 7 Tex.Tech.L.Rev. 671, 685-87 (1976).

[6] There is also no support for the Ninth Circuit's imposition of rigid quota goals absent consideration of "good faith" in the Executive Order or Revised Order No. 4 (Pet.App. A-38—A-39). Compliance is secured not by federal fiat or litigation but by "conference, conciliation, mediation, and persuasion" before considering sanctions such as contract termination and bidding ineligibility. Exec. Order No. 11246, § 209(b), at 3 C.F.R. 169, 174; § 205 at 3 C.F.R. 172. Revised Order No. 4 itself premises compliance upon the contractor's good faith efforts to secure equal employment opportunity for minorities. Section 60-2.12, entitled "Establishment of Goals and Timetables," provides in Subsection (a) that projected minority hiring goals "may not be rigid and inflexible quotas which must be met, but

(footnote continued on following page)

While petitioner further contends, *infra,* pp. 13-15 that the Ninth Circuit applied an erroneous standard in equating under-utilization with discrimination, it is necessary here to note that numerical disparities found by the District Court were not predicated upon an industry-wide exclusionary practice or as a direct and obvious result of the historic, pervasive practice of craft labor organizations or employers to exclude minorities and women from entrance into a specific industry. Here, unlike the Executive Order construction industry cases cited by Mr. Justice Powell in *Bakke,*[7] the food processing industry has not been

(footnote concluded from preceding page)

must be targets reasonably attainable by means of applying every good faith effort to make all aspect of the entire affirmative action program work." 41 C.F.R. 204, 207. Indeed, under Subsection (k) establishment of separate goals and timetables for different minority groups is not required, even upon a showing of substantial disparity of "under-utilization." 41 C.F.R. at 209. And Section 60-2.14, entitled "Compliance Status," expressly provides "[n]o contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables." 41 C.F.R. at 208. In short, these regulations provide essential discretionary flexibility to better enable the federal government to promote fair employment practices, even gradually if necessary, rather than risking the forfeiture of all positive influence which might result from an arbitrary or rigid compliance standard. This is not a federal program administered under simple, inflexible standards.

[7] *Contractors Ass'n of Eastern Pa.* v. *Sec. of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971); *Associated Gen. Contractors of Mass* v. *Altshuler,* 490 F.2d 9 (1st Cir. 1973), *cert. denied,* 416 U.S. 957 (1974). Mr. Justice Brennan did not list these cases in his citations for the proposition that race conscious remedies had been approved in the absence of judicial findings of discrimination. 438 U.S. at 364.

judicially noticed to have practiced industry-wide discrimination. Moreover, here, the statistical imbalances were presented to the Court by Legal Aid without the contractors' participation or any rebuttal evidence as to the actual effect of the individual contractor's hiring practices.

The imposition of hiring quotas upon federal contractors under the procedures of this case raise questions of grave concern to all current and potential government contractors and to a large segment of the nation's labor force whose promotional and employment prospects are necessarily diminished proportionately to the extent of preferential affirmative action. The immediate impact of this case is staggering. At least 40% of the nation's labor force work in positions subject to the Executive Order, and over 50% of the nation's employers with 100 or more employees are subject to the affirmative action requirements of the Executive Order. 5 *U.S. Comm'm on Civil Rights, The Federal Civil Rights Enforcement Effort, 1974: To Eliminate Employment Discrimination,* 230 (1975); Goldstein & Smith, "The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors", 29 Indus. Lab.Rel.Rev. 523, 531-39, 542-43 (1976).

The resolution of this issue should not be postponed. The decision below has an immediate impact upon all government contractors within the jurisdiction of the Ninth Circuit. This impact is also a continuing one for under the District Court's decree all future approvals of affirmative action plans by OFCCP, the successor compliance agency, must be furnished to Legal Aid for its scrutiny (Pet.App. A-73). The decision below also brings confusion and uncertainty for other government contractors having facilities within other Circuit Courts of Appeals. If this cause were initiated in the Fifth Circuit, no such rigid quota relief under the Executive Order would have been ordered in the absence of a finding of prior hiring or promotion discrimination. *Weber* v. *Kaiser Aluminum & Chem. Corp.*, 563 F.2d 217, 226-27 (1977), *reversed on other grounds.*

443 U.S. 193 (1979). Resolution of this conflict among the circuits on the fundamental question of the propriety of preferential relief is further reason for granting the petition.[8]

On a more significant plane, the case raises the issue of the legality of involuntary affirmative action quotas to correct racial imbalances in the work place. The Court is well aware of the intensity of the social and political debate over the proper place of such relief in our antidiscrimination policy. See Fuller, "The Forms and Limits of Adjudication", 92 Harv. L.Rev. 353, 394-404 (1978); Comment: "How Far Can Affirmative Action Go Before It Becomes Discrimination?", 26 Cath. U.L.Rev. 513, 546 (1977). Whether such relief serves this policy and under what circumstances are questions which now require guidance from the Court.

III.

THE NINTH CIRCUIT'S STANDARD FOR IMPOSING RACE-CONSCIOUS REMEDIES CONFLICTS WITH DECISIONS OF THIS COURT

In *Steelworkers* v. *Weber, supra,* the Court suggested that a numerical imbalance between a work force and the labor market may permit *voluntary* correctional race preference remedies, particularly in the context of a collective bargaining relationship where the union may be safely presumed to adequately represent the interests of current nonminority employees. See *Franks* v. *Bowman Transp. Co., supra,*. The

[8] The District Court's decree is the mirror image of Technical Guidance Memo. No. 1. The continuing application of this Memo to all government contractors, as applied and enforced by OFCCP, transforms goals into fixed quotas without regard to a contractors good faith. Indeed OFCCP has continued to follow this approach. *In The Matter of Firestone etc.*, BNA Daily Labor Report Dec. 12, 1978 (Pet.App. A-91-A-107); (See also Ninth Circuit Opinion Pet.App. A-29 fn. 36). The affirmance of the District Court's decree by the Ninth Circuit has, therefore, approved the method adopted by the District Court and OFCCP of enforcing Executive Order 11246 through mandatory hiring preferences based solely upon race.

decision, however, did not reach the distinct question decided here, that a statistical disparity alone warrants the imposition of mandatory, *involuntary* race conscious hiring quotas based solely upon race. The Ninth Circuit's basis for imposing this relief is contrary to and inconsistent with this Courts' decisions discussing the proper use of statistical evidence and the burden of proof which must be met to support even an inference of discrimination in Title VII cases. The Court has repeatedly stated that evidence of a statistical imbalance at most presents a rebuttable presumption of discrimination which the alleged violator must be permitted to rebutt. *Furnco Constr. Corp.* v. *Waters,* 438 U.S. 567, 579-580 (1978); *Teamsters* v. *United States, supra,* 431 U.S. at 339. Unlike *Teamsters,* the Ninth Circuit here adopted the District Court's imposition of hiring quotas upon "statistics alone" (Pet.App. A-21). Moreover, the statistical "disparities" here were found upon a comparison between particular jobs and the minority work force as a whole (Pet.App. A-59).

This Court has held that such comparisons have little if any probative value. In *Hazelwood School District* v. *United States,* 433 U.S. 299,308 n. 13, Mr. Justice Stewart stated:

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.

While *Hazelwood* involved a public employer, it is clear that private employers are equally included within its rationale. See *Teamsters* v. *United States, supra,* 431 U.S. at 340 n. 20. Reliance upon general population—job category comparisons is prohibited by section 703(j).

In *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), the Court established an orderly evidentiary procedure and allocated the burden of proof in Title VII discriminaiton cases. The charged party need not introduce evidence of neutral hiring practices until after a *prima facie* case has been

established. *Board of Trustees* v. *Sweeney,* 439 U.S. 24, 25 (1978). This standard of proof of discrimination stands in stark contrast to the one relied upon by the Court of Appeals, which premised its judgment upon the District Court's use of a statistical imbalance as conclusive of an irrebutable finding of discrimination. This evidentiary basis for race preferential relief is markedly in contrast with the standard articulated by this Court under Title VII. Unless Congressional intent that the Executive Order cannot override Title VII is to be flagrantly flouted, then federal contractors must not be subject to sanctions on a lower standard of culpability than that imposed by Congress under sections 703 and 707 of Title VII. The standard of discrimination which justifies preferential remedies based solely upon race should be identical under both statutory and regulatory antidiscrimination schemes. The justification for this position is, of course, that Congress in Title VII requires it, and further such uniform standards will create a consistent and reliable means of scrutinizing the identical employment decision making process for discriminatory intent.[9]

The Second Circuit, we believe, has adopted the proper evidentiary standard for the imposition of racial hiring quotas. In *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420 (1975)[10], a discrimination action brought under 42 U.S.C. §§ 1981, 1983, such relief was limited to circumstances where plaintiffs demonstrated a clear-cut pattern of

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[9] Under equal protection analysis, adverse impact alone upon protected classes is insufficient to invalidate state action; proof of intent to discriminate is required. *Personnel Administrator of Mass.* v. *Feeney,* 442 U.S. 256, 276 (1979); *Arlington Heights* v. *Metropolitan Hous. Corp.,* 429 U.S. 252, 270-71, 270 ns. 20 and 21 (1977). See also *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45-6 (1937) (discriminatory motive must be proven under section 8(a)(3) of NLRA).

[10] Reaffirmed in *EEOC* v. *Local 638, Sheet Metal Workers,* 532 F.2d 821, 827-8 (2d Cir. 1976).

long-standing and egregious racial discrimination and where such relief would not affect identifiable nonminority employees or job applicants. The Court has not considered whether this standard is a valid restriction upon court-ordered quota relief, or whether the Executive Order is subject to the evidentiary standard of discrimination adopted by the Court under Title VII. Government contractors must have definitive criteria upon which they can reliably assess their personnel policies and if necessary, take steps to protect themselves from contract debarment and reverse discrimination lawsuits. Note, "Title VII And Preferential Treatment: A Response to EEOC Affirmative Action Guidelines", 67 Geo.L.J. 855, 872-76 (1979). The appropriate use of racial preferences in employment under Executive Order 11246 and the evidentiary standard upon which such remedial measures must be predicated are significant questions which can and need to be resolved.

CONCLUSION

For the reasons stated above, the Chamber respectfully requests this Court to grant its petition in this case for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LAURENCE B. KRAUS,
General Counsel
CHAMBER OF COMMERCE OF
THE UNITED STATES OF
AMERICA,
1615 H. Street, N.W.,
Washington, D.C. 20006,

GERARD C. SMETANA,
Suite 1400
33 North Dearborn Street
Chicago, Illinois 60602
WILLIAM H. DUROSS, III
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Petitioner.

Of Counsel:
LAW OFFICES OF
GERARD C. SMETANA
Suite 1400
33 North Dearborn Street
Chicago, Illinois 60602
Suite 200
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

March 3, 1980.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEGAL AID SOCIETY OF ALAMEDA COUNTY; STEPHEN E. RONFELDT; LINDA CASTILLO; DELORES LUSTER; JOHN STAFFORD; ISADORE PAYNE; WESTERN REGIONAL JOB COUNCIL,

Plaintiffs-Appellees,

v.

PETER J. BRENNAN, Secretary of the United States Department of Labor; PHILIP DAVIS, Acting Director of the Office of Federal Contract Compliance; EARL L. BUTZ, Secretary of the United States Department of Agriculture; WILLIAM GLADDEN, Chief, Contract Compliance Division, Office of Equal Opportunity, United States Department of Agriculture,

Defendants,

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, on behalf of its affected members,

Defendant-Intervenors-Appellants; — No. 74-2954

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs-Appellees, — No. 74-3013

v.

NCC FOOD CORPORATION,

Defendant-Intervenor-Appellant;

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs-Appellees, — No. 74-3014

v.

DEL MONTE CORPORATION,

Defendant-Intervenors-Appellants;

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs-Appellees, — No. 74-3015

v.

CPC INTERNATIONAL

Defendant-Intervenor-Appellant;

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs-Appellees,

v.

CARNATION COMPANY, H. J. HEINZ COMPANY, SUNSHINE BISCUITS, INC., BEL' BRAND FOODS, INC.,

Defendants-Intervenors-Appellants;

No. 74-3234
No. 74-3250

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs-Appellees,

v.

GRANNY GOOSE FOODS, INC.,

Defendant-Intervenor-Appellant;

No. 74-3317

LEGAL AID SOCIETY OF ALAMEDA COUNTY et al.,

Plaintiffs-Appellees,

v.

GOLDEN GRAIN MACARONI CO., and its division, GHIRARDELLI CHOCOLATE., INC.,

Defendants-Intervenors-Appellants.

No. 74-3391

OPINION

Appeal from the United States District Court for the Northern District of California

Before: BROWNING, WALLACE and KENNEDY, Circuit Judges

BROWNING, Circuit Judge:

As a condition of doing business with the federal government, larger federal contractors are required to develop "written affirmative action compliance programs" designed to further equal employment opportunity. The contents of these programs are specified by regulation. 41 C.F.R. §§ 60-1.40, 60-2.10 to 13.

Several Black residents of Alameda County, California and organizations representing them, brought this suit against re-

sponsible federal officials, alleging they had failed to discharge their duty to ensure the maintenance by food processing contractors of adequate affirmative action programs. The district court granted partial summary judgment and injunctive relief. *Legal Aid Society* v. *Brennan,* 381 F.Supp. 125 (N.D. Cal. 1974).

I.

A.

Executive Order 11246 requires government contracting agencies to include in most federal and federally-assisted contracts dual covenants (1) that the contractor "will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin," and (2) that the contractor will "take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin."[1] This suit concerns the second covenant—the "affirmative action" obligation—which was added to the "nondiscrimination" obligation in 1961 in response to "an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity . . ." 26 Fed.Reg. 1977 (March 8, 1961).

The duty to enforce Executive Order 11246 is vested in the Secretary of Labor, who is authorized to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes" of the Order.[2]

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[1] Executive Order 11246 § 202, 30 Fed.Reg 12319 (1965), *as amended by* Executive Order 11375, 32 Fed.Reg 14303 (1967), 42 U.S.C.A. § 2000e note (1974)

For a detailed history of Executive Order 11246 and its predecessors, *see Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159, 168-71 (3d Cir. 1971).

[2] Executive Order 11246 § 201.

Pursuant to his rule-making authority, the Secretary has delegated enforcement responsibility to the Office of Federal Contract Compliance Programs (OFCCP).[3] Until recently, this office in turn delegated day-to-day enforcement to various "compliance agencies." USDA was designated as the compliance agency for non-construction contractors in the food production and processing industry.[4]

The Secretary of Labor has issued regulations detailing the manner in which contractors are to fulfill the affirmative action commitment. Each contractor with 50 or more employees and a federal contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments. 41 C.F.R. § 50-1.40. The contents of the programs are specified in Revised Order No. 4, 41 C.F.R. Part 60-2.[5] Acceptable programs include two basic elements: (1) "an analysis of areas within which the contractor is deficient in the utilization of minority groups and women," and, where the analysis discloses deficiencies, (2) "goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies . . . at all levels and in all segments of his work force where deficiencies exist." 41 C.F.R. § 60-2.10. The

[3] 41 C.F.R. § 60-1.2 (1977), *as revised,* 43 Fed.Reg 49240 (October 20, 1978).

[4] OFCC, Revised Order No. 1 (October 24, 1969), *reprinted at* [1970] Empl. Prac. Guide (CCH) ¶ 17.650. The authority for designating compliance agencies was found in 41 C.F.R. § 60-1.3(d) (1973). USDA's compliance responsibilities were reassigned in 1977. The entire compliance agency system was subsequently abolished and all compliance responsibilities consolidated in OFCCP. *See* 43 Fed.Reg. 43572 (September 26, 1978), *reprinted at* [1978] Empl. Prac. Guide (CCH) ¶ 4380.

[5] Revised Order No. 4 first became effective in 1970. 35 Fed.Reg. 2586 (1970). Its provisions at the time the district court entered its order in this action appear at 41 C.F.R. Part 60-2 (1973). As presently modified, they appear at 43 Fed.Reg. 49240 (October 20, 1978).

factors to be considered in analyzing minority and female utilization and in formulating goals and timetables for correcting underutilizations are spelled out in 41 C.F.R. §§ 60-2.11 and 2.12. Certain additional ingredients required of acceptable affirmative action programs are set out in 41 C.F.R. § 60-2.13. Revised Order No. 4 also details the procedures compliance authorities are to follow in securing corrective action when a contractor's program fails to satisfy the specified criteria and in imposing sanctions if corrective action is not forthcoming. 41 C.F.R. § 60-2.2.

B.

Appellees' complaint contained two central allegations. First appellees charged that responsible USDA officials failed to review the affirmative action programs of a majority of federal contractors within USDA's compliance jurisdiction.[6] This portion of the case is still pending below. Second, appellees alleged that where compliance reviews were undertaken, USDA officials regularly approved programs that did not comply with Revised Order No. 4. In discovery proceedings in support of the second claim, appellees obtained the affirmative action programs of 29 contractors in Alameda County, California, that had been reviewed and approved by USDA from August 1972 through January 1973. These included the programs of all Alameda County contractors within USDA's compliance jurisdiction. Based upon these programs and letters from the officials approving them, appellees moved for partial summary judgment on the complaint that USDA officials had regularly approved noncomplying programs. Appellees asked that the officials be restrained from approving noncomplying programs, and that they be required to rescind approval of

[6] Named defendants were the Secretary of Labor, the Director of OFCCP, the Secretary of Agriculture, and the Chief of the Contract Compliance Division of USDA's Office of Equal Opportunity.

deficient plans and initiate enforcement proceedings against companies submitting these plans.

The district court granted appellees' motion. It concluded that components of affirmative action programs that were mandated by Revised Order No. 4 were nonetheless absent from the programs approved by the officials. It declared ten specific programs to be violative of the regulations, and therefore illegally approved. The court enjoined USDA officials from approving programs that did not comply with Revised Order No. 4. They were ordered to rescind approval of the ten noncomplying programs, to issue show cause notices to the contractors submitting them, and to seek sanctions against any contractor that did not develop and implement a complying program.[7]

The federal officials filed, then withdrew, a notice of appeal, and have appeared in this court in support of the judgment.

The appellants are contractors whose affirmative action plans formed the basis for the court's order. The plans of four appellants were among the ten specifically declared unacceptable.[8]

Appellants were not parties to the proceedings below. After partial summary judgment was granted, appellants sought to intervene generally for the purpose of reopening the proceedings. The district court denied their motion, but permitted intervention for the purpose of appeal.

Appellants present five issues. First, they contend that approval of affirmative action plans by a compliance agency is

[7] The order also established a reporting and monitoring system requiring USDA officials to submit newly approved affirmative action programs to the court and to appellees' counsel for inspection. This part of the decree is not contested.

[8] Appellant of Commerce appears as a representative of various contractors.

not subject to judicial review or remedies, at least not at the behest of these appellees. Second, they contend that judicial review, if available, was premature because appellees had not exhausted administrative remedies. Third, they argue that they were entitled to participate in the proceedings below, and that entry of summary judgment without their presence deprived them of due process. Fourth, they contend that in finding the affirmative action programs inadequate and in formulating the decree, the district court relied upon standards that were erroneous in substance and not lawfully promulgated. Finally, they argue that the decree imposes hiring and promotion quotas in violation of the Constitution and of Title VII of the Civil Rights Act of 1964.

The federal appellees argue that appellants lack the requisite interest to maintain this appeal. Appellants counted that their interests were sufficient not only to permit intervention to appeal but also to require that the judgment be set aside because they were not parties to the proceedings in the court below. We turn first to these contentions.

II.

A.

The federal appellees argue that appellant contractors have no appealable interest in the decision below because the district court's order is directed only to the manner in which the federal appellees carry out their regulatory responsibility. They further contend that the interests of appellants can be fully protected in the administrative process, which affords contractors the right to justify their compliance efforts before sanctions for noncompliance may be imposed.

[1, 2] Post-judgment intervention for purposes of appeal may be appropriate if the intervenors act promptly after judgment, *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 395-96 & n. 16, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977);

Pellegrino v. *Nesbit,* 203 F.2d 463, 465 (9th Cir. 1953), and meet traditional standing criteria. *United States* v. *Imperial Irrigation Dist.,* 559 F.2d 509, 521 (9th Cir. 1977).[9] Appellees do not challenge the timeliness of appellants' motion to intervene for the purpose of appeal, but question whether appellants have met the standing criteria by alleging a threat of particularized injury from the order they seek to reverse that would be avoided or redressed if their appeal succeeds.[10]

[3, 4] Appellants allege that if the order is implemented, appellants' past and future compliance efforts will be measured by erroneous legal standards and appellants' ability to retain current contracts and their eligibility for future contracts will be affected by those erroneous standards. The four appellants whose affirmative action programs were disapproved by the district court further allege that approval of their programs will be rescinded and show cause orders will be issued against them, leaving them the choice of preparing new programs or suffering

[9] Since the federal defendants have acquiesced in the judgment against them, appellants must demonstrate such a stake in the outcome of an appeal that a live Article III case or controversy remains for appellate resolution. *See* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv.L.Rev. 721, 753-54 (1968). If appellants satisfy this threshold requirement, they necessarily possess the interest required to support intervention under Fed.R.Civ.P. 24, as well as the required "appealable interest" in the adjudication below, *see Fishgold* v. *Sullivan Corp.,* 328 U.S. 275, 281-83, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); *Seaboard Surety Co.* v. *United States,* 306 F.2d 855, 859 (9th Cir. 1962); Shapiro, *supra* at 753.

[10] *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); *Village of Arlington Heights* v. *MHDC,* 429 U.S. 252, 260-61, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *United States* v. *Imperial Irrigation District,* 559 F.2d 509, 517 (9th Cir. 1977).

termination of existing contracts and debarment from future contracts. These allegations reflect a "sufficiently direct threat of personal detriment," *Planned Parenthood of Missouri* v. *Danforth,* 428 U.S. 52, 62, 96 S.Ct. 2831, 2838, 49 L.Ed.2d 788 (1976), to establish standing. Appellants' interests could not be fully protected in subsequent administrative proceedings since the agency would have no authority to question the validity of the district court's interpretation of the regulations so long as the decree remained in effect.[11]

[5] Appellees assert appellants have suffered no injury—that the district court's order simply conformed to existing regulations and required the government officials to undertake only those enforcement measures they had a present duty to perform in any event. The argument addresses the merits of the action, not the issue of standing. *Flast* v. *Cohen,* 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); *City of Chicago* v. *Atchison, Topeka & Santa Fe R.R. Co.,* 357 U.S. 77, 83-4, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958).

Appellants are properly before this court as intervenors on appeal.

B.

The contractor appellants argue that the interests which give them standing to appeal also required that they be joined as parties initially or be allowed to intervene, and that they be accorded notice and hearing before entry of the decree below.

[6-8] Assuming appellants should have been joined as parties to the proceedings below, their presence on appeal renders harmless any defect in the party structure so far as the provisions of the decree respecting standards governing future

[11] To the extent appellants were admitted as permissive intervenors, they were not required to show their stake in the case could not be fully protected elsewhere. Fed.R.Civ.P. 24(b).

compliance are concerned.[12] Appellants' objections to the district court's interpretation of the Executive Order and administrative regulations raise strictly legal issues subject to full review in this court. Appellants' future compliance will be judged by the agency against standards formulated after full and fair consideration of appellants' objections on this appeal.[13]

[9] The decree also orders compliance officials to rescind approval of the ten affirmative action programs found to be defective, including the programs of four of the appellants, and to institute enforcement proceedings immediately under the applicable regulations. Appellants contend that due process, the compulsory joinder requirements of Rule 19(a), and the guarantee of intervention as of right upon timely application under Rule 24(a), precluded the court from passing in their absence upon the legality of their specific conduct. Appellees

[12] Where the judgment can be shaped to cure any prejudice to a party absent below, dismissal at the appellate stage is not required. *See Provident Tradesmen Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 111-12, 116, 119, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). *See also* 7 Wright & Miller, Federal Practice & Procedure: Civil § 1611 (1972); Fed.R.Civ.P. 21 (dismissals for defect in party structure disfavored).

[13] Appellant Chamber of Commerce also contends that appellees lacked standing to challenge enforcement of the Executive Order by compliance officials. *See* Part IIIB *infra.* Denial of intervention except to appeal may have foreclosed the Chamber's opportunity to contest the factual basis for appellees' standing, an opportunity not fully protected on this appeal. However, the Chamber did not appeal the denial of intervention, but only the earlier entry of summary judgment. It therefore can argue only that the court's conclusion that appellees had standing was erroneous on the record before the district court, in which appellees' claims to standing were not disputed. This argument is considered in Part IIIB *infra.*

The individual contractor appellants, who have appealed the denial of intervention, do not challenge appellees' standing. Whatever interests they may have had in contesting standing in the district court are not asserted on this appeal.

respond that the invalidated programs have been superseded in the process of annual revision and updating required by the regulations, 41 C.F.R. § 60-1.40(c), and issues relating to the process by which they were invalidated have thereby become moot. Appellants do not deny that the invalidated programs have been replaced, but argue only that forward-looking features of the decree remain. Issues relating to the latter features of the decree are fully dealt with on this appeal, as we have said. We accept appellee's undisputed suggestion that events subsequent to the district court's finding that specific programs were deficient have deprived that action of any present consequence, and vacate as moot the portion of the decree ordering rescission of approval of the condemned programs and issuance of show cause notices to the contractors submitting them.

III.

A.

[10, 11] The provisions of Revised Order No. 4, issued under Executive Order 11246, have the force of law.[14] Appel-

[14] *See United States* v. *New Orleans Pub. Serv., Inc.,* 553 F.2d 459, 465-68 (5th Cir. 1977), *vacated and remanded on other grounds,* 436 U.S. 942, 98 S.Ct. 2841, 56 L.Ed.2d 783 (1978). Provisions of the regulations governing disclosure of information secured from contractors may not be sufficiently rooted in a grant of authority from Congress to have the force of law, *see Chrysler Corp.* v. *Brown,* 441 U.S. 281, 99 S.Ct. 1705, 1718-1721, 60 L.Ed.2d 208 (1979), but there can be no doubt that the essential features of the affirmative action program reflected in the regulations promulgated in Revised Order No. 4 were effectively ratified by Congress in adopting the Equal Employment Opportunity Enforcement Act of 1972. Several frontal attacks on the OFCC goal-and-timetable enforcement system were defeated during congressional consideration of the 1972 Act. Court decisions upholding the validity of the affirmative action program under the Executive Order were

(footnote continued on following page)

lants do not disagree. They contend, however, that the terms of the Executive Order and Revised Order No. 4 are not enforceable in the courts.

[12, 13] Administrative action is subject to judicial review unless it is clear that such review was not to be available. *Morris* v. *Gressette,* 432 U.S. 491, 500-01, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); *Barlow* v. *Collins,* 397 U.S. 159, 166-67, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Arizona Power Pooling*

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before the legislators and figured prominently in the debates. *See* 118 Cong.Rec. 1664-72, 4918 (1972) (remarks of Sen. Javits, reprinting decision in *Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971)); *id.* 1386 (Sen. Saxbe); *id.* 1663-64 (Sen. Ervin); 117 Cong.Rec. 32089 (Rep. Dent); *id.* 31965 (Rep. Green), H.R.Rep. No.92-238, 92nd Cong. 2d Sess. (1971) (separate views of Rep. Green); *reprinted at* [1972] U.S.Code Cong. & Admin.News, pp. 2137, 2176-77. In rejecting the assault on the OFCC affirmative action approach. Congress approved the exercise of executive authority to issue binding regulations regarding minority utilization. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U.Chi.L.Rev. 723, 757 (1972).

Independent Meat Packers Ass'n v. *Butz,* 526 F.2d 228 (8th Cir. 1975), which appellants cite, is not to the contrary. That court held that Executive Order 11821 was not judicially enforceable. Executive Order 11821 requires executive agencies to evaluate the inflationary impact of major legislative proposals, rules, and regulations emanating from the executive branch. The court's conclusion that the Executive Order lacked legal force rested on the premise that the Order "was intended primarily as a managerial tool for implementing the President's personal economic policies," and had been issued as a housekeeping measure rather than pursuant to constitutional or statutory authority. 526 F.2d at 235-36. *See also Manhattan-Bronx Postal Union* v. *Gronouski,* 121 U.S. App.D.C. 321, 350 F.2d 451 (D.C. Cir. 1965). Executive Order 11246 rests upon statutory and other congressional authorization. *See United States* v. *New Orleans Pub. Serv., Inc., supra.*

Ass'n v. *Morton,* 527 F.2d 721, 727 (9th Cir. 1975).[15] Nothing in Executive Order 11246 precludes judicial review. Indeed, the Order appears to anticipate such review by preserving, in addition to sanctions expressly authorized by the Order, remedies "as otherwise provided by law." E.O. 11246, § 202(6).

[14, 15] Although the Executive Order and implementing regulations place heavy reliance upon administrative expertise and discretion, not all compliance review action is committed to discretion of the agency. In these circumstances, judicial review limited to the non-discretionary aspects of agency action is appropriate. *Ness Investment Corp.* v. *USDA Forest Service,* 512 F.2d 706, 714-15 (9th Cir. 1975); *East Oakland-Fruitville Planning Council* v. *Rumsfeld,* 471 F.2d 524, 533-34 (9th Cir. 1972).[16] The regulations sought to be enforced here identify in clear mandatory terms elements that must be included in affirmative action programs before they may be deemed acceptable by compliance officials. Programs "*must* include an analysis of the areas within which the contractor is deficient in the utilization of minorities and women," 41 C.F.R. § 60-2.10. This analysis "*must* contain" the work force breakdown spelled out in 41 C.F.R. § 60.211, plus a utilization-availability study in

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[15] It is questionable whether an Executive Order could of its own force preclude judicial review of action taken pursuant to it. Congress may create regulatory bodies with lawmaking powers and insulate those bodies from judicial oversight. It does not follow that the President may do so solely by Executive Order, without congressional ratification. In any event, Executive Order 11246 rests upon statute and other congressional authorization (*see* note 14), and neither the President nor Congress has indicated an intent to preclude judicial review of action taken by compliance authorities under the Executive Order.

[16] *Compare Peters* v. *Hobby,* 349 U.S. 331, 345, 75 S.Ct. 790, 797, 99 L.Ed. 1129 (1954) ("Agencies, whether created by statute or [by] Executive Order, must of course be free to give reasonable scope to the terms conferring their authority. But they are not free to ignore plain limitations on that authority.").

which the contractor "*will* consider" at least eight enumerated factors. 41 C.F.R. § 60-2.11(a)(1) (1973).[17] Programs also "*must* include . . . goals and timetables," 41 C.F.R. § 60-2.10, which "*must* be designed to correct any identifiable deficiencies." 41 C.F.R. § 60-2.12(g).[18] Affirmative action programs "*shall* contain" the additional ingredients listed in 41 C.F.R. § 60-2.13.

[16] There is no discretion as to the presence of these components in an acceptable affirmative action plan. Programs that lack them do not comply with Revised Order No. 4. Judicial review is available to insure that compliance officials perform their non-discretionary duty to refrain from approving plans that do not contain the elements mandated by the regulations. The remedies available under the Administrative Procedure Act—setting aside unlawful program approvals, 5 U.S.C. § 706(2), and compelling unlawfully withheld agency rejection of noncomplying programs, 5 U.S.C. § 706(1)—may be invoked against compliance officials who violate this duty.[19]

[17] In the most recent version of Revised Order No. 4, this provision appears in 41 C.F.R. § 60-2.11(b)(1) (1977). *See* 43 Fed.Reg. 49240, 49250-51 (October 20, 1978).

[18] Similarly, "program[s] *shall* provide . . . when there are deficiencies, [for] the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity." 41 C.F.R. § 60-1.40(a).

[19] *Adams* v. *Richardson,* 156 U.S.App.D.C. 267, 480 F.2d 1159 (D.C. Cir. 1973) (en banc), supports this conclusion. *Adams* held reviewable the alleged consistent failure of the Department of Health, Education and Welfare to enforce Title VI of the Civil Rights Act of 1964 against public school districts receiving federal funds. Appellants distinguish *Adams* on the ground that Title VI specifically permits a judicial role in its enforcement. Nothing in the *Adams* opinion suggests that HEW enforcement orders were made reviewable expressly. 480 F.2d at 1161-63. In any event, judicial review need not be expressly authorized; availability of judicial review is presumed unless clear evidence precludes it.

[17] Relief in the nature of mandamus is also appropriate. 28 U.S.C. § 1361. In arguing to the contrary, appellants stress the informality and flexibility of the enforcement scheme under the Executive Order, pointing to its emphasis on mediation and conciliation, 41 C.F.R. §§ 60—2.2(c)(2),[20] 60—1.24(c)(2) (1973), and to the express reservation that "[n]o contractor's compliance status shall be judged alone by whether he meets his goals and timetables .... [but] shall be reviewed and determined by . . . his good faith efforts to make his program work ...." 41 C.F.R. § 60—2.14. As appellants correctly argue, areas of the administrative process so laced with discretion are traditionally shielded from direct judicial intervention. *Smith* v. *Grimm,* 534 F.2d 1346, 1352 (9th Cir. 1976); *Jarrett* v. *Resor,* 426 F.2d 213, 216 (9th Cir. 1970); *Wilmot* v. *Doyle,* 403 F.2d 811, 816 (9th Cir. 1968). But these are not the areas as to which appellees sought and obtained relief. Appellees' claim went to a threshold matter—the required content of acceptable affirmative action plans. This issue is distinct from such subsequent questions as to whether a contractor is in compliance with a valid affirmative action program (to which the good faith standard is relevant), or what should be done to secure compliance once it is determined that a contractor has violated his affirmative action obligations (to which the conciliation provisions are directed).[21] Appellees seek only to "require . . . [compliance] officers . . . to perform the ministerial duty of complying with their own regulations" by disapproving programs that do not contain the elements required by the regulations. *Workman* v. *Mitchell,* 502 F.2d 1201, 1205 (9th

[20] In the current regulations this provision appears as 41 C.F.R. § 60-2.2(c)(3) (1977). *See* 43 Fed.Reg. 49240, 49250 (October 20, 1978).

[21] As Revised Order No. 4 recognizes, the complex task of "transform[ing] . . . paper commitments into equal employment opportunity" requires leeway for the operation of discretion and good faith. But "developing and judging" the initial adequacy of the paper commitments can be carried out according to clearly stated criteria. 41 C.F.R. § 60-2.1.

Cir. 1974). *See also Elliott* v. *Weinberger,* 564 F.2d 1219, 1226 (9th Cir. 1977), *aff'd in part, rev'd in part sub nom. Califano* v. *Yamasaki,* ____ U.S. ____, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). For this an order in the nature of mandamus will lie. It is no bar to such relief that the court may be required to interpret Revised Order No. 4 to determine the precise scope of the agency's duties. "[O]nce the court interprets the law, the defendant's duty will become clear; the court is not telling the defendant how to exercise his discretion." *Knuckles* v. *Weinberger,* 511 F.2d 1221, 1222 (9th Cir. 1975).

Appellants rely on three Court of Appeals' holdings that Executive Order 11246 does not afford a basis for a private right of action by an employee against an employer for alleged discrimination. These cases are inapposite. Two involved suits for damages for alleged violation of nondiscrimination covenants in private employers' contracts with the government.[22] The courts held that a private right to initiate judicial enforcement of such a covenant independently of the government would be inconsistent with the enforcement scheme created by the Executive Order. The third case involved a suit by a government employee against the government as an employer, and was based primarily upon sovereign immunity.[23]

[**18**] Appellees do not seek recognition of a supplemental private enforcement mechanism. They do not seek damages for specific acts of discrimination against themselves. They ask only that the court review the government's own enforcement effort against the standards established by the Executive Order and regulations. Review of this sort is an ordinary element of administrative enforcement schemes, absent clear indication to the contrary. Since the only relief sought in such a suit is that

[22] *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3 (3d Cir. 1964); *Farkas* v. *Texas Instrument, Inc.,* 375 F.2d 629 (5th Cir. 1967).

[23] *Gnotta* v. *United States,* 415 F.2d 1271, 1275 (8th Cir. 1969).

government officials be required to perform the nondiscretionary duties imposed upon them by the Executive Order and regulations, the action is by definition compatible with the scheme established by the Order and regulations. The reluctance of courts to imply separate private enforcement rights from statutes or regulations which provide explicitly only for government enforcement procedures and penalties, *see, e.g., Cort* v. *Ash,* 422 U.S. 66, 78-80, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *National R. R. Passenger Corp.* v. *National Ass'n of R. R. Passengers,* 414 U.S. 453, 458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), is not applicable to such a private proceeding as this.

If the cases on which appellants rely correctly deny the right to initiate a private suit against a discriminating employer under Executive Order 11246, judicial oversight of enforcement efforts of government officials through such a suit as this becomes doubly important; without it, no remedy would be available against compliance agencies that ignore the specific requirements of the Executive Order and regulations.

[**19**] The argument that sovereign immunity bars this suit is no longer available. After briefs were filed, Congress amended the Administrative Procedure Act to remove the sovereign immunity defense to judicial review of administrative action where nonmonetary relief is sought. *See* Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721, *amending* 5 U.S.C. § 702. The amendment is applicable on this appeal. *Hill* v. *United States,* 571 F.2d 1098 (9th Cir. 1978).

B.

[**20**] Appellant Chamber of Commerce contends that even if a private judicial remedy is available, appellees have no standing to pursue it.[24]

[24] The Legal Aid Society of Alameda County and the Western Regional Job Council appear as representatives of the

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[21, 22] The standards for evaluating standing are clear. To establish an Article III case or controversy plaintiffs must allege they "personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . . that is likely to be redressed if they requested relief is granted." *Gladstone, Realtors* v. *Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979). The injury must be "fairly traceable to the defendant's acts or omissions," *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977); there must be a " 'substantial likelihood' that the relief requested will redress the injury claimed." *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 75 n. 20, 98 S.Ct. 2620, 2631, n. 20, 57 L.Ed.2d 595 (1978).[25] To sustain a favorable judgment, the allegations must be uncontroverted or proven.[26]

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individual appellees. Their standing turns on that of the individuals they represent. *Hunt* v. *Washington Apple Advertising Commission,* 432 U.S. 333, 342-43, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), and is not challenged separately by appellants.

[25] *See also Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *United States* v. *Imperial Irrigation District,* 559 F.2d 509, 517 (9th Cir. 1977), *on denial of rehearing,* 595 F.2d 525 (9th Cir. 1979); *Bowker* v. *Morton,* 541 F.2d 1347, 1349 (9th Cir. 1976).

[26] Article III controls not only who may have access to federal courts at the threshold of the litigation, but also who may obtain a judgment. To invoke federal jurisdiction, plaintiffs must allege facts adequate to confer standing; to obtain a judgment and remedy, plaintiffs must establish the truth of these or other adequate allegations. *See Gladstone Realtors* v. *Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979); *Duke Power Co.* v. *Carolina Environmental Study Group,* 438 U.S. 59, 72-78, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

A fair application of the standards to this case is made difficult by the fact that appellees' standing was first questioned in a reply brief filed in this court by the Chamber of Commerce—no other appellant raised the issue. Appellees' standing was not contested in the trial court—the defendant officials did not deny the factual allegations of the complaint relating to appellees' standing; they did not challenge the factual or legal basis for appellees' standing either in their motion to dismiss the complaint or in their opposition to appellees' motion for partial summary judgment.

[23] The Chamber's sole argument on standing, stated in one paragraph in its reply brief, is that contractors might refuse to contract with the government to avoid complying with the requirements of the decree, thereby rendering the decree useless and decreasing rather than increasing job opportunities for appellees—an argument we reject for reasons stated below. At no point in the proceedings in this court or the court below has any party suggested that the named appellees were not injured or were unlikely to benefit individually from the decree even if the overall effect of the decree was to make more jobs available for minority job-hunters in Alameda County. No doubt the record would be substantially more complete had appellees been called upon to marshall the facts and law in support of standing in response to a timely challenge to standing. Taking the record as it is, however, enough appears to justify the conclusion that standing requirements were satisfied.

[24] The complaint alleged that the defendant federal officials approved affirmative action programs which did not comply with Revised Order No. 4. The district court agreed, finding the officials had consistently approved programs lacking adequate work force composition analyses and statements of goals and timetables to correct underutilizations of minorities and women.[27] The complaint further alleged that as a result of

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[27] The correctness of this finding goes to the merits and is assumed for purposes of standing. *Warth* v. *Seldin,* 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). It is considered in parts V-VI, *infra.*

the improper approval of affirmative action programs individual appellees were denied employment opportunities with contractors for whom appellees desired to work. Second Amended Complaint ¶¶ 3C-F, 23D, 42. Each individual appellee alleged that he or she is an unemployed black resident of Oakland (in Alameda County), and that he or she sought employment unsuccessfully with identified contractors and was turned away on the basis of race and/or sex. Appellee Castillo, for example, alleged that she desired employment generally with contractors within the defendant officials' compliance jurisdiction, that she sought employment with the Chiodo Candy Company and was turned away without being asked the type of job she sought or her qualifications, and that she was denied an opportunity to apply for work because of her race and sex. On the basis of these uncontested allegations and the record as a whole, the district court concluded that appellees "who have unsuccessfully sought jobs with federal contractors" had standing because they were "directly and adversely affected by the failure of [defendant officials] to carry out their monitoring duties [with respect to approval of affirmative action programs] under Executive Order 11246."

[**25-28**] Two established rules of construction have significant bearing upon the adequacy of these allegations and findings. The allegations are to be treated as admitted since not denied, Fed.R.Civ.P. 8(d); and the allegations and supporting evidence are to be construed in favor of the appellees—the parties asserting standing, *see Warth* v. *Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Moreover it is unnecessary to examine the standing of all appellees so long as one had standing to secure the requested relief. *See Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). We conclude that appellee Castillo had standing.

[**29, 30**] The denial of employment opportunities to Castillo satisfied the requirement of "actual injury." It must also

appear that this injury was caused by the federal officials' failure to enforce the executive order. Such causation is established if actual job opportunities would have arisen had the federal officials refused to approve deficient affirmative action programs. Fairly read, the complaint alleged and the district court found that, absent approval of deficient programs, additional minority job opportunities would have been available with the contractors from whom appellees sought employment. The substance of appellee Castillo's claim was that she was unable to obtain consideration for suitable work with the Chiodo Candy Company because enforcement officials had not required goals and timetables to remedy the underutilization of women and blacks in the company's work force. A contemporary compliance review of the Chiodo work force showed that although minority persons constituted 9.4% of the area labor force, Chiodo had no black employees in the service worker category, one black among its 30 unskilled employees (laborers), none in the semi-skilled category (operatives), and none among its office and clerical workers or in management positions. Only in the skilled craftsman category did it have substantial black representation (five of 19 employees). Had compliance officials required implementation of an affirmative action plan containing the goals and timetables appellees contend were required, it is more than purely speculative that Chiodo would have been seeking qualified minority applicants to correct the evident company-wide underutilizations. Moreover, contemporary compliance reviews reflected underutilizations of blacks by 70% of the Alameda County food processing contractors, and systematic underutilization of blacks both overall and in every or virtually every job category by more than a third of such contractors.[28] There is a substan-

[28] Shasta Beverages had one black employee in a work force of 154, or .6% utilization. That employee was one of twenty technicians, giving that category a 5% utilization level; in all other categories utilization was zero. Carnation Company

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tial probability that enforcement of the decree against these contractors would have opened new job opportunities in every category for black persons generally and for Castillo specifically. This evidence together with the uncontradicted allegations of the complaint were sufficient to show that appellee Castillo's injury was "fairly traceable" to the challenged approval of deficient affirmative action programs. Castillo must also show a substantial probability that the relief sought will remedy the alleged injury. When a plaintiff has established the requisite causation, the court usually may infer that correction of defendant's improper conduct will relieve the injury caused thereby. *See Gladstone, Realtors* v. *Bellwood, supra,* 99 S.Ct. 1601 at

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had four black employees of 316 in the work force (1.2%), with utilization at zero in several categories and no higher than 6% in any. Oscar Meyer and Heinz had no black employees at all. Rath Packing had one black employee of 48 (2%) overall and of 23 (4.3%) in the semi-skilled operatives category, all other categories showing zero utilization. Kockos Brothers showed 17 black employees of 336 (5%), all but two in the operatives category (which itself had the highest utilization (6%) in the work force). Foremost Transport had four black employees of 54 (7.4%), with underutilization in all but one category in which one of the two employees was black. Ghirardelli Chocolate had two black craftsmen and one black unskilled laborer among 73 employees (4.1%), with underutilization in all but one job category. Kilpatrick's Bakery had 15 black employees of 247 (6%), with underutilization in all but the service worker category. Safeway Stores had 37 black employees in a work force of 741 (4.9%), with zero utilization in some categories and underutilization in all others except service workers, where blacks constituted more than 41% of the work force.

Other contractors evidenced underutilization in some but not all categories. Some of these also showed underutilization in their overall figures as well. *E.g.*, Kellogg Company (6.3% overall, with underutilization in office and clerical, craftsman, and high-level management categories); Golden Grain Macaroni (7.7% overall; underutilization in laborer, craftsman, office and clerical, and high-level management).

1608; *Duke Power Co.* v. *Carolina Environmental study Group, supra,* 438 U.S. at 74, 98 S.Ct. 2620. A properly functioning enforcement authority can require, by force of sanction, that contractors within its jurisdiction comply with their own affirmative action programs. If Castillo's claims have merit, it is substantially probable that concrete job opportunities for minority applicants will arise with Chiodo and other identified contractors in the same area in every or virtually every job category, from unskilled labor through high level management.[29]

[31] Whatever specific level of skills or qualifications Castillo has, some work opportunity for which she is qualified will likely materialize with these identified employers in the area in which she desires to work. This is sufficient to establish standing. *Compare Arlington Heights* v. *Metropolitan Housing Development.,* 429 U.S. at 264, 97 S.Ct. 555. Appellee need not prove she is bound to be selected for the new opportunities over all others. Like the individual plaintiff in *Arlington Heights,* she need show only that her "quest" for a desired employment opportunity for which she could have competed was "thwarted" by the actions complained of, and that the opportu-

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[29] Castillo did not allege in so many words that she was qualified for specific positions which would have been available had the contractors been required to implement adequate affirmative action plans. But Castillo did allege that Chiodo turned her away "without even asking the type of job that she sought or what her qualifications were." This necessarily implied that appellee believed herself qualified to perform some work required in the company's operations, and Chiodo underutilized blacks in virtually every job category. Moreover, appellee alleged she was denied consideration for work "on the basis of" her race and sex. Since refusal to hire because of lack of qualification is not refusal to hire because of race or sex, the necessary implication of this allegation is that Castillo was not hired despite the fact that she was qualified. One who claims loss of employment solely due to racial discrimination necessarily claims to possess the requisite job qualifications.

nity will likely materialize—thus allowing her to compete for it—if the defendants act as required by the decree. *Cf. id.*

[32] The argument advanced by the Chamber of Commerce—the only objection to standing actually raised by any party—is all but frivolous. The Chamber does not suggest that appellees were not injured nor that the decree, if complied with, would not have alleviated this injury. The Chamber's argument is that the contractors might elect to forego their contracts with the government rather than comply with affirmative action programs of the kind appellees assert to be required, and if they did so the injury to appellees would persist. The record reflects no substantial additional cost or other factor that might have led the contractors to abandon existing and presumably profitable contracts with the government, and accept debarment from future contracts, rather than correct deficiencies in their affirmative action programs. On the contrary, the record suggests both that the increase in the available labor supply that would have resulted from elimination of discrimination against women and minorities would have reduced the contractors' costs, and that the opportunity to contract with the government was of great value to the contractors.[30] *Compare Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 43-44, 96, 1917, 48 L.Ed.2d 450 (1976).

Castillo and the other appellees also satisfy the prudential limitations on standing. Like the individual plaintiff in *Arlington Heights,* appellees assert more than a generalized grievance shared in equal measure by many others. Appellees' injury as minority job seekers among the Alameda County contractors is "peculiar to [themselves] or to a distinct group of which [they

[30] The Chamber does not suggest the record could have been supplemented with concrete evidence to support the Chamber's speculation about contractor withdrawal, had the Chamber had an opportunity to participate below. At any rate, the Chamber must accept the record as it stands, since the Chamber has appealed only the summary judgment and not the denial of intervention. *See* note 13.

are] a part." *Gladstone, Realtors* v. *Bellwood,* 441 U.S. at 100, 99 S.Ct. at 1608. They assert their own rights, not those of third parties. *Id.*[31] As set forth in part IIIA of this opinion, plaintiffs have a right to seek judicial relief under Executive Order 11246 and Revised Order No. 4. *Warth* v. *Seldin, supra,* 422 U.S. at 500, 95 S.Ct. 2197.

IV.

[33] Appellants argue the district court acted prematurely by granting relief without requiring appellees to exhaust the administrative remedy available under 41 C.F.R. § 60-1.21 *et seq.* (1973). These provisions apply to complaints by employers, or applicants for employment, against individual employers for alleged acts of discrimination violating the employer's contractual obligations to the government.[32] Although the complaint in this case alleges such acts as the immediate source

[31] If the "zone of interests" limitation on standing survives, at least as to matters of review under the Administrative Procedure Act, *see Gladstone, Realtors* v. *Bellwood,* 441 U.S. 91, 99 S.Ct. at 1608 n. 6 (1979); *compare Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38-39 n. 19, 96 S.Ct. 1917 (1976); K. Davis, Administrative Law in the Seventies § 22.02-11 at 509-15 (1976); 13 Wright, Miller & Cooper, Federal Practice & Procedure; Civil § 3531 at 87 (Supp. 1978), as a member of a minority group seeking a job with federal contractors, Castillo falls easily within the zone of interests protected by Executive Order 11246 and Revised Order No. 4.

[32] The complaint procedure in force when appellees began this action permitted any employee or applicant of a federal contractor to file "a complaint of alleged discrimination in violation of the equal opportunity clause." 41 C.F.R. §§ 60-1.21, 1.22 (1973). The procedure was apparently designed to handle complaints that specific employment decisions violated the nondiscrimination covenant of the employer's federal contract. Thus, the complaint must identify the contractor "committing the alleged discrimination" and must describe "the acts considered to be discriminatory." 41 C.F.R. § 6-1.23.

of the "distinct and palpable injury" to individual appellees essential to standing, these acts are not the primary target of the litigation. The complaint is directed instead at the ultimate cause of appellees' injury—the systematic approval by government officials of affirmative action programs that did not contain the provisions mandated by the regulations to expose and eliminate discriminatory employment practices. Appellees seek a declaration of the standards by which the adequacy of affirmative action plans must be judged and a declaration of the duties of compliance officials in implementing those standards. The administrative procedures to which appellants point are not designed for processing claims of this sort or to provide relief of this scope. With respect to this major aspect of appellees' claim, there was no administrative remedy to be exhausted. *Rosado* v. *Wyman,* 397 U.S. 397, 406 & n. 8, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).[33]

[**34**] Moreover, even if the complaint procedures were applicable to appellees' primary claim, we would not reverse because appellees failed formally to exhaust them. This is not a case in which exhaustion of administrative remedies is required by statute as a prerequisite to judicial intervention. As applied

[33] *Freeman* v. *Schultz,* 153 U.S.App.D.C. 152, 468 F.2d 120 (D.C. Cir. 1972), and *Hadnott* v. *Laird,* 149 U.S.App.D.C. 358, 463 F.2d 304 (D.C. Cir. 1972), on which appellants rely, are distinguishable. In both cases, the complaint was directed at discriminatory acts of a particular contractor or contractors. The relief sought (cancellation of existing contracts and debarment from future contracts) was that authorized in such cases by the Executive order and regulations. Executive Order 11246, § 209(a) (1965) 41 C.F.R. § 60-1.24(c)(3) (1973). Hadnott did seek relief against the responsible enforcement officials, and the dissenting judge would have read the complaint as directed to the failure of these officials to perform their duty, but the majority treated the complaint as seeking relief against specific offending companies and relegated the plaintiffs to the administrative remedy available for processing such complaints. *See also* note 35 *infra.*

here, the requirement that administrative remedies be exhausted is a judicially created doctrine to be employed in the manner that best serves the competing interests of the court, the agency, and the aggrieved individual in the circumstances of the particular case. *Montgomery* v. *Rumsfeld,* 572 F.2d 250, 253-54 (9th Cir. 1978). None of the interests served by the exhaustion requirement would be advanced by a reversal in this case.

The private appellees did not deliberately flout the administrative process. It is questionable whether the formal remedy provided by the regulations was applicable to any part of appellees' claims. Appellees submitted their grievance to the agency by informal means before filing suit, and the agency ruled against them on the merits, finding the affirmative action programs acceptable. After litigation was commenced, the district court, following the procedures approved in *State of Washington* v. *Udall,* 417 F.2d 1310, 1319 n. 14 (9th Cir. 1969), required the private appellees to present their claims to compliance officials a second time, but to no avail.[34] Thus agency officials were afforded an opportunity to correct their errors, to make their expertise available, and to develop an administrative record for review, *see Weinberger* v. *Salfi,* 422 U.S. 749, 765, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), and declined to do so. Moreover, as defendants in this litigation, responsible officials provided the court with the counsel of their experience and expertise to the extent expertise was relevant.

[34] Before filing this lawsuit, private appellees requested federal officials to intensify enforcement of the Executive Order and regulations. In response, the agency conducted reviews of all Alameda County contractors within its compliance jurisdiction. The agency concluded all had acceptable affirmative action programs. After appellees filed suit, the court ordered proceedings stayed "to permit disposition of all issues herein involved at the administrative level of each of the offices affected by the complaint." Appellees submitted a detailed memorandum to the agency discussing the various areas in which appellees believed administrative enforcement of the regulations to be deficient. The agency took no action.

They participated actively in the proceedings below and made their views as to the correct construction of the regulations known to the court. Finally, no factual determinations were involved for which agency procedures or creation of an administrative record could have been especially useful. *See McGee* v. *United States,* 402 U.S. 479, 485, 91 S.Ct. 1565, 29 L.Ed.2d 47 (1971). The allegation was that the responsible agency officials approved affirmative action programs that were facially inadequate in light of the Executive Order and regulations. Only the documents themselves were relevant. Thus, while resolution of some charges of affirmative action clause violations might require detailed fact-finding and record-building—for example, a charge that the contractor had not sought in good faith to implement his affirmative action program—the court in this case was not disadvantaged by the lack of formal agency complaint proceedings below.[35]

[35] These factors further distinguish *Freeman* and *Hadnott. See* note 33. Those cases involved alleged violations of the nondiscrimination clause in particular contracts. Such violations usually raise factual issues as to the relationship between the employer and the alleged discriminatee. *Compare Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 575, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978). Agency investigation procedures may be especially valuable in ferreting out these facts, and the administrative record compiled by the agency may be essential to judicial review. This fact-finding and record-building were absent in *Freeman* and *Hadnott, see,* 153 U.S.App.D.C. at 155 & n. 6, 468 F.2d at 123 & n. 6; 149 U.S.App.D.C. at 362, 463 F.2d at 308. As a consequence, the reviewing court had no basis, short of hearing the testimony itself, upon which to judge whether the agency determination of nondiscrimination was justified.

Further, in this case appellees' letters and subsequent communications with the agency and their detailed informal complaint to the agency cataloging the asserted flaws in the approved affirmative action plans, together with the court's decision to stay its hand for further administrative-level negotiations, gave the agency a significantly greater opportunity to

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V.

[35] The legitimacy of the standards applied by the district court in evaluating affirmative action programs and in formulating the decree is challenged on procedural grounds.

The district court concluded that compliance officials approved affirmative action programs that were in violation of Revised Order No. 4 in one or more of the following respects: (1) they contained inadequate utilization analyses, 41 C.F.R. § 60—2.11; (2) they failed to establish adequate goals and timetables designed to correct underutilization of minorities and women within the minimum period necessary, 41 C.F.R. §§ 60—2.12, 60—1.20(b); and (3) they failed to include the required additional ingredients listed in 41 C.F.R. § 60—2.13.

In the course of its analysis, the court referred to Technical Guidance Memo No. 1, issued to compliance agencies "to give specific guidance on the proper interpretation of certain selected issues that have been or continue to be raised regarding Revised Order 4."[36] Appellants contend that as used by the

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correct the asserted errors than did the single, unpursued oral complaint in *Freeman,* 153 U.S.App.D.C. at 153-54, 468 F.2d at 121-22, or the apparent lack of any resort to the agency at all in *Hadnott.* Indeed, in *Hadnott* there was every indication that the agency was correcting *sua sponte* the errors of which plaintiffs complained. 149 U.S.App.D.C. at 360, 463 F.2d at 306.

[36] The Memo was issued by the Office of the Federal Contract Compliance of the Department of Labor on February 22, 1974, a few months before partial summary judgment was granted. Although the Memo has not been published, its provisions are virtually identical to those of OFCCP's *Standard Contractor Review Report,* Part B, § XII.B(a)-(c), published in the Federal Register three weeks after entry of the district court's order. *See* 39 Fed.Reg. 25655 (1974), *codified* at 41 C.F.R. § 60-60.9 (1977), 43 Fed.Reg. 49240 (1978).

district court Technical Guidance Memo No. 1 was a legislative rule having a substantial impact upon the rights and obligations of federal contractors, and was invalid because not issued pursuant to the rule-making procedures of 5 U.S.C. § 553, citing *Texaco, Inc.* v. *FPC*, 412 F.2d 740, 745 (3d Cir. 1969), and related cases. Appellees respond that Technical Guidance Memo No. 1 is an interpretive rule exempt from notice-and-comment requirements under subsection (b)(A) of 5 U.S.C. § 553. *See, e.g., Energy Reserves Group, Inc.* v. *Department of Energy*, 589 F.2d 1082 (Em.App.1978).

We need not decide whether the Technical Guidance Memo is to be classified as a legislative rule and, if so, whether it was lawfully issued. Although the district court found support for its holding in the Technical Guidance Memo (381 F.Supp. at 135-39), the court also concluded that reference to the Memo was not necessary to the decision of this case (381 F.Supp. at 135-36 n. 16). We agree. It is clear without reference to the Memo that appellee officials repeatedly approved affirmative action programs that failed to satisfy the fundamental requirements of Revised Order No. 4.

Although approved by compliance officials, none of the affirmative action programs contained an analysis of all eight factors specified in Revised Order No. 4, 41 C.F.R. § 60—2.11, for determining underutilization in any job category.[37] Most of

[37] 41 C.F.R. § 60-2.11(b)(1) reads:

In determining whether minorities are being underutilized in any job classification the contractors will consider at least the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area.

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the programs failed to establish goals and timetables designed to correct the underutilization of minorities and women, 41 C.F.R. § 60—2.12(g), in a manner that would assure the "prompt achievement of full and equal employment opportunity." 41 C.F.R. § 60—1.40(a). The goals set forth in the programs neither established long-range targets to complete the correction of underutilizations, 41 C.F.R. § 60—2.12(e), nor committed the contractor to eradicating underutilizations within any period of time, 41 C.F.R. §§ 60—2.12(d), 60—1.20(b). The annual numerical goals of a number of the programs rested on unexplained underprojection of job openings anticipated by the contractor for the forthcoming year.[38] All the programs failed to contain one or more of the "additional ingredients" required by 41 C.F.R. § 60—2.13, including development and implementation of affirmative action recruiting programs for minorities and women, 41 C.F.R. § 60—2.13(f)(j), plans for support of community-based programs designed to improve employment opportunities for minorities and women, 41 C.F.R. § 60—2.13(i), and development of internal audit and reporting systems for measuring the effectiveness of the program, 41 C.F.R. § 60—2.13(g).

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(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

A similar analysis is required for utilization of women by section 60-2.11(b)(2).

[38] *See* 351 F.Supp. at 137 & n.19.

VI.

Appellants object that certain provisions of the decree are at variance with the Executive Order and implementing regulations.

The court ordered compliance officials to approve only affirmative action programs containing the utilization analyses, goals and timetables, and additional ingredients called for by Revised Order No. 4. The decree imposes specific requirements with respect to each of these components. The utilization analysis in each affirmative action program must compare, separately for each set of similar jobs, the percentage of women and of each of specified minority groups in the contractor's existing work force with the percentage of available women and members of each minority group in the applicable labor area. The applicable labor area must be defined as either the city, county or Standard Metropolitan Statistical Area, depending upon which of the three has the highest minority population, unless the contractor justifies use of an area with fewer minority residents.[39] The decree requires that an ultimate goal be set for

[39] The portion of the decree dealing with utilization analyses provides:

(a) Each program must contain a utilization analysis that satisfies each of the following requirements:

(i) The analysis must include a list of all major job categories (hereinafter referred to as "job groups") in the contractor's work force and, for each such job group, a statement of the total number of male and female incumbents for each of the following ethnic groups: Blacks, Spanish-Surnamed Americans, American Indians and Orientals.

(ii) Minority and female "availability" must be separately analyzed for each job group. The availability analysis must include a statement of the specific percentages of minority persons (stated separately for Blacks, Spanish-Surnamed Americans, American Indians and Orientals) and minority and non-minority

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each job group at least equal to the percentage of women and minority workers in the job group available in the applicable labor market; that a minimum feasible period be established for achieving this goal; and that interim percentage hiring rates be fixed and remain in effect until that underutilization is completely corrected.[40] Each program must contain specific and

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women determined to be available in the applicable labor area for each job group.

(iii) Whenever the percentage of total minorities or of any ethnic group exceeding 2% of the surrounding population or of women in a job group is lower than the percentage of such persons available in that job group within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that job group.

(iv) For purposes of determining availability, the labor area must not be defined in such a way as to minimize the availability of minorities or women. In defining the relevant labor area, the contractor must set forth statistics showing the ethnic and sexual composition (including specific data for the four minority ethnic groups) of the population of the Standard Metropolitan Statistical Area, county and city in which the establishment is located and other appropriate adjacent areas. Any program which adopts a labor area which has a minority population lower than the highest of the SMSA, county or city must be rejected unless the program provides an appropriate written justification for the use of such area.

[40] The goals-and-timetables portion of the decree provides:

(b) Each program must contain goals and timetables which satisfy each of the following requirements:

(i) An ultimate goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The ultimate goal must be stated as a percentage of the total employees in the job group and must be at least equal to the percentage of minorities or women available for work in the job group in the labor market.

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detailed action-oriented recruitment and training programs.[41]

Appellants object that the decree requires compliance officials to apply rigid standards and criteria in testing the adequacy of the utilization analysis, goals and timetables, and compliance programs in affirmative actions plans, and that this is inconsistent with Revised Order No. 4 which imposes flexible

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> (ii) For each job group in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.
>
> (iii) For each job group in which underutilization exists, the contractor must establish rates for hiring or promoting the minorities and women. The rates must be stated as a percentage of new placements in the job group, and they must remain in effect (unless specifically modified on the basis of subsequent data) until the underutilization is completely corrected. The percentage rates must be the maximum rates that can be achieved through the contractor's putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentages set in the ultimate goals. Numerical goals based on projected openings are permissible but cannot be used in place of percentage rates.

[41] The action-oriented-program requirement of the decree provides:

> (c) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with the requirements of Revised Order No. 4. These programs must, at a minimum, commit the contractor to undertake every good faith effort to contact and use in some concrete and specific manner relevant recruitment and training resources for recruitment and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the contractor itself and related to the locality.

standards and leaves determinations of compliance largely to the discretion of compliance officials. Appellants misread the regulations and the decree.

Appellants argue, for example, that the regulations do not require affirmative action programs to contain "ultimate goals" for female and minority utilization as distinguished from annual or interim goals, or indeed, no goals at all; and that the regulations do not require goals tied to the percentage of available women and minorities in the job groups or in the labor pool, as distinguished from flexible goals or goals keyed to a lower level that is more practical in the particular circumstances.

The regulations do not explicitly require that ultimate goals be fixed, but they do so by inescapable implication. Goals are to be directed toward achieving *"full* and equal employment opportunity." 41 C.F.R. § 60-1.40(a) by correcting *"any* identifiable deficiencies" in female or minority utilization. 41 C.F.R. § 60-212(g). Affirmative action programs must be "result-oriented," and the result to which they are to be directed under the current regulations is not merely "to increase materially the utilization of minorities and women"—as it once was, 41 C.F.R. § 60-2.10 (1973)—but "to achieve prompt and *full* utilization of minorities and women" in deficient segments of the contractor's work force. 41 C.F.R. § 60-2.10 (1978). Goals that must be stated in terms of "full utilization" and correction of "any deficiencies" can hardly be less than ultimate goals.[42]

[42] As appellants note, the regulations anticipate that goals will not be established in some circumstances. For example, 41 C.F.R. § 60—2.12(k) provides that when no goal is provided the affirmative action program must detail reasons for the omission. Appellants argue that the decree conflicts with the regulations in this respect because the decree provides without qualification that "Each program must contain goals and timetables." However, it is clear from the decree as a whole, and federal appellees concede that if goals are inappropriate under the regulations in any circumstances, the exception would be equally applicable under the decree.

[36, 37] Similarly, although the regulations do not state in so many words that acceptable ultimate goals must reflect a level of female and minority employment in the contractor's establishment at least equal to the percentage of women and minorities available in the job group in the contractor's labor area, no other inference is consistent with what the regulations do state. Under the regulations, goals in affirmative action programs are designed to correct underutilizations. 41 C.F.R. § 60-2.12(g). Underutilizations are "fewer minorities or women in a particular job group than would reasonable be expected by their availability." 41 C.F.R. § 60-2.11(b). Availability figures are to reflect only qualified workers reasonably available in the relevant labor pool. *Id.* It follows that, absent discrimination utilization will not be less than availability, and that to correct underutilization goals must be set to achieve parity with the level of available women and minority workers in the relevant labor pool. To say that compliance official may accept employment goals lower than the level of qualified women or minority workers in the relevant labor area, as appellants do, is inconsistent with the simple central canon of the regulations that underutilization must be corrected.[43]

This analysis of the decree and the regulations also suggests the error in appellants' argument that by determining underutilization and setting goals and hiring rates on the basis of a comparison of percentages of women and minorities in job

[43] In this and other respects the district court's interpretation of the regulations reflected in the decree is consistent with that found in Technical Guidance Memo No. 1. *See* note 36. Although we have refrained from deciding whether the Memo is a lawfully published rule having the force of law, unquestionably it reflects a construction of Revised Order No. 4 by the agency responsible for its promulgation and enforcement. As such it is entitled to weight (*Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)), even though it may not be binding authority because of formal deficiencies. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

categories in a contractor's work force and in the relevant labor area, the decree substitutes a rigid mathematical formula for the flexible determination encompassing all relevant factors contemplated by the regulations. The percentage of women and minorities available in a contractor's work force is to be determined by a consideration of the right variables specified in the regulations, including, as noted above, possession of the necessary skills for the particular job category. The same is true of the determination of the percentage of such persons available in the work force in the relevant labor area. The comparison of percentages is mechanical, but the percentages to be compared are computed on the basis of the full range of variables specified in the regulations.

[38] Appellants also argue that the decree substitutes a rigid definition of the relevant labor area for flexible guidelines in Revised Order No. 4. The regulations require that the contractor's availability analysis account for potential minority employees in the area "surrounding [his] facility," "in the immediate labor area," and "in an area in which [he] can reasonably recruit." 41 C.F.R. § 60-2.11(b)(1)(i)-(v), (2)(i)-(v). The decree provides that a program which adopts a labor area having a lower minority population than the highest in three standard geographical statistical units (Standard Metropolitan Statistical Area, County, and City) "must be rejected unless the program provides an appropriate written justification for the use of such areas."[44] This provision of the decree does not displace the regulatory standard. It simply provides a triggering mechanism for requiring a more explicit demonstration on the written record that the standard has been met when it appears that the boundaries of the labor market may have been skewed to exclude minority workers.

The district court found that compliance officials repeatedly approved affirmative action programs containing over or under-inclusive labor area definitions which minimized minor-

[44] *See* Para (1)(a)(iv) of the decree, note 39.

ity availability. 381 F.Supp. at 135. Requiring a full written exposition in the affirmative action program of the justification for the boundaries drawn, when the circumstances suggest manipulation, will make it more difficult for compliance officials to approve noncomplying programs in the future, and easier to detect abuses if they occur. At the same time, the power of the agency to determine the appropriate labor market by careful analysis of the commuting distances, communications channels, and related factors, remains unimpaired. If the written justification satisfies compliance officials that the portions of the municipal unit with the highest minority population are beyond reasonable commuting or recruiting range, for example, a more limited labor area may be approved though its minority population is lower.

[**39**] This provision of the decree reflects an appropriate exercise of the court's power, in fashioning a remedy on administrative review, to "adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *NLRB,* 305 U.S. 364, 373, 59 S.Ct. 301, 307, 83 L.Ed. 221 (1939). The court's power is broad, so long as the court acts "within the bounds of the [regulation] and without intruding upon the administrative province." *Id.* The decree violates neither the language of Revised Order No. 4 nor the "administrative province" of compliance authorities. *Cf. Mitchell* v. *DeMario Jewelry,* 361 U.S. 288, 290-92, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Indiana & Michigan Electric Co.* v. *FPC,* 163 U.S.App.D.C. 334, 344, 502 F.2d 336, 346 (D.C. Cir. 1974).

[**40**] Finally, basing goals on availability levels does not restrict administrative flexibility "in deciding when compliance has been achieved," as appellants argue. However the goals are stated, they remain only "targets reasonably attainable by means of applying every good faith effort" by the contractor. 41 C.F.R. § 2.12(e). Compliance is measured by good faith efforts to attain them, not by whether they are realized. 41

C.F.R. § 2.14. The decree does not alter this key tenet. It affects only how the goals must be set, nor how they are to be met.

VII.

Appellants argue that the provision in the decree restraining compliance officials from approving affirmative action plans unless they include hiring and promotion rates equalling the percentage of minorities and women available in the relevant labor market, requires preferential hiring and promotion on the basis of race and sex and is incompatible with section 703(a)(1), (2), (d) and (j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), (2), (d) & (j), and with the equal protection component of the Due Process Clause of the Fifth Amendment.

[**41**] Appellants' argument rests on the premise that this provision of the decree requires preferential hiring and promotion of underutilized minorities and women, and consequent "reverse discrimination" against individuals not in these groups. Appellants' premise is false. Nothing in the decree or inherent in the circumstances of this case requires preferential treatment or discrimination on the basis of race or sex. We therefore need not consider when if ever racial and sexual preferences and discrimination undertaken to comply with Executive Order 11246 can be lawful under either Title VII or the Constitution. *Cf. United Steelworkers of America* v. *Weber,* ___ U.S. ___, ___, 99 S.Ct. 2721, 2726, 2730, 61 L.Ed.2d 480 (1979); *id.* at ___, 99 S.Ct. at 2726 (Rehnquist, J., dissenting).

The source of hiring and promotion goals and rates required by the decree to be included in acceptable affirmative action programs is significant. As noted earlier (*see* text at note 43), these goals and rates reflect the contractor's own determination of the percentage of minority and female workers

qualified for the particular job group who are reasonably available for employment by that contractor. The goals and rates thus represent the contractor's own judgment as to the percentage of females and minority members that would be found in his work force if all available qualified persons applied for employment and if all selection processes operated in a completely nondiscriminatory manner. Given this premise, it is entirely reasonable to assume that a contractor who finds a lower percentage of women or minority members in a particular job category in his work force may well be able to correct the deficiency simply by removing obstacles to fair and equal employment, without reliance upon racial preference or discrimination.

Underutilization may be traced to failure of available women and minority workers to apply, for a variety of reasons, in the expected numbers. They may not be aware of job openings. If this is the problem, contacts may be established with local organizations, institutions, or individuals who are in a position to refer women and minority applicants; advantage may be taken of media and events through which potential women and minority applicants can be reached; and word-of-mouth recruiting by women and minority employees and applicants may be encouraged.[45] Perhaps the contractor will discover that potential applicants are discouraged by the contractor's negative image among women workers or in the minority community. If so, the problem may be solved by designating minority liaison officers, 41 C.F.R. § 60—2.22(a)(b), or by widening dissemination of the contractor's fair employment policy and practices, *id.* § 60—2.21(a)(b). Or deficiency in the flow of applications from women and minority workers may be attributable to persons other than the contractor—to labor unions or subcontractors, for example—whom the contractor can persuade to abandon exclusionary practices. *Id.* § 60—2.23(b)(17).

[45] *See* 41 C.F.R. § 60 2.24(e). *See also* [1976] Empl. Prac. Guide (CCH) 1414; Fiss, *A Theory of Fair Employment Laws,* 38 U.Chi.L.Rev. 235, 282-85 (1971).

If the contractor is attracting a balanced flow of applicants, underutilization may be the product of improper screening or selection processes. Facially objective job criteria that screen out women and minority workers disproportionately may prove to be irrelevant or only marginally related to job performance, and new and validated criteria can be substituted. *Id.* § 60—2.24(b); [1976] Empl. Prac. Guide (CCH) ¶¶ 1416, 1418. Or the contractor may discover that hiring personnel entertain subjective biases (conscious or not) that can be corrected by instruction or training, or by removing biased officials from the hiring process. 41 C.F.R. § 60—2.24(d).

Under most conditions these and similar steps to correct flaws in the contractor's hiring system will involve neither preference nor discrimination, yet they may be adequate to enable the contractor to comply fully with hiring and promotion goals and rates required under the decree. Of course, it may prove otherwise. Employers may find it expedient to adopt, indeed compliance officials may require, affirmative action programs that involve preference and discrimination.[46] Both administrative and judicial remedies will be available to test the lawfulness of such provisions on the basis of a specific record. But because the hiring and promotion requirements of the Revised Order and decree may lead in some circumstances to the adoption of questionable programs is not a sufficient ground for condemning the requirement on its face: "A hypothetical threat is not enough," *United Public Workers* v. *Mitchell,* 330 U.S. 75, 90, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947).

Paragraph (2) of the decree is stricken as moot. The remainder of the decree is affirmed.

APPENDIX II

LEGAL AID SOCIETY OF ALAMEDA COUNTY et al., Plaintiffs,

v.

Peter J. BRENNAN, Secretary of the United States Department of Labor, et al., Defendants.

No. C-73-0282 AJZ.

United States District Court,
N.D. California.
June 20, 1974.

MEMORANDUM OPINION

ZIRPOLI, District Judge.

Executive Order 11246, issued September 24, 1965,[1] requires companies that hold federal contracts to:

> take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.

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[1] Executive Order 11246 is the latest in a series of executive orders going back over 30 years which were designed to promote equal employment opportunities for minority groups by requiring federal contractors to include nondiscrimination provisions in their contracts with the government. The first such executive order was issued by President Franklin D. Roosevelt on June 25, 1941. Executive Order 8802, 6 Fed.Reg. 3109 (1941). It ordered. "All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin . . ." The order also set up a Committee of Fair Employment Practices to investigate complaints of discrimination in violation of the order and take appropriate steps to redress valid grievances.

The order was continued in substantially the same form by President Truman in 1945 and 1951. Executive Orders 9664 and 10308, 10 Fed.Reg. 15301 (1945) and 16 Fed.Reg. 12303 (1951); and by President Eisenhower in 1953, Executive Order 10479, 18 Fed.Reg. 4899 (1953), although primary responsibility for obtaining compliance with the nondiscrimination

This case involves important questions concerning the enforcement of this executive order and the scope of judicial review of individual governmental agencies' actions taken in its enforcement. Plaintiffs move for partial summary judgment and an order requiring the United States Department of Agriculture [USDA] and the persons within the USDA responsible for enforcing the executive order to refrain from approving affirmative action programs of contractors assigned to the USDA in Alameda County, California, which do not comply with the regulations that set out the requirements of an adequate affirmative action program. Before considering the narrow questions presented by this motion, it is necessary to review the history of this litigation, the executive order and regulations at issue, and consider defendants' objections to the court's jurisdiction.

I

Plaintiffs' original complaint filed in this action in February, 1973, contained four claims for relief, seeking: (1) to compel defendants to release information on the ethnic com-

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provisions was imposed on the heads of the various contracting agencies. On March 6, 1961, President Kennedy issued Executive Order 10925, 26 Fed.Reg. 1977 (1961), which established the President's Committee on Equal Employment Opportunity. The order for the first time required the contractors to take affirmative action to ensure nondiscrimination and established sanctions and penalties for noncompliance. Executive Order 11246, presently in effect, was issued by President Johnson, 30 Fed.Reg. 12319 (1965), and transferred responsibility for its implementation to the Secretary of Labor. Executive Order 11246 was amended by Executive Order 11375, 32 Fed.Reg. 14303 (1967), issued October 13, 1967, to include discrimination on the basis of sex within its nondiscrimination provisions. More detailed discussions of this history are contained in *Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3, 5-7 (3d Cir. 1964), and *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 168-171 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971). The text of Executive Order 11246, as amended, may also be found

position of the work forces of the Alameda County contractors subject to Executive Order 11246; (2) to require the USDA to disclose the affirmative action programs and compliance review reports of Alameda County contractors assigned to the USDA for enforcement purposes; (3) to require defendants responsible for these programs within the USDA to enforce the requirements of Executive Order 11246 and the regulations and orders issued pursuant to the executive order; and (4) to direct the Secretary of Labor and the Director of the Office of Federal Contract Compliance [OFCC], who delegated enforcement responsibility to the USDA, to require the USDA to comply with the executive order and corresponding regulations.

Named as defendants were Peter J. Brennan, Secretary of the Department of Labor, who is responsible for the overall administration of Executive Order 11246, and who is required to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes" of the executive order;[2] Philip J. Davis, Director of the OFCC, to whom the responsibility for enforcing the executive order has been delegated;[3] Earl L. Butz, Secretary of the USDA, to which primary enforcement responsibility for federal contractors engaged in farming, the provision of agricultural services, suppliers of food and kindred products, tobacco manufacturers, and certain businesses in the wholesale food trade have been assigned;[4] and, finally, William Gladden, Chief of the Contract

[2] Exec. Order No. 11,246 § 201, 3 C.F.R. 169, 170 (1974).

[3] *See* 41 C.F.R. § 60-1.2 (1973).

[4] Fifteen federal agencies including the USDA have been designated as "compliance agencies" by the OFCC and assigned compliance responsibilities under Executive Order 11246 for specific industries according to the categories of the Standard Industrial Code. The OFCC regulations make each such agency primarily responsible for obtaining compliance with the executive order and regulations issued by the OFCC. *See* 41 C.F.R. § 60-1.6 (1973).

Compliance Division of the USDA's Office of Equal Opportunity, who is ultimately responsible for enforcement within the USDA.

Plaintiffs originally included the Alameda Legal Aid Society, a federally funded law project which represents low income minority persons in Alameda County, California, and which has a compliance project designed specifically to secure the enforcement of laws relating to equal employment opportunity; the director of the project; four unemployed minority persons who have sought employment at businesses which come within the compliance requirements of the executive order and regulations issued thereunder; and the Western Regional Job Council, an unincorporated association in Oakland, California, whose primary concern is the employment of minority persons.[5]

[5] The initial stages of this litigation involved plaintiffs' attempts to obtain disclosure of the EEO-1, or ethnic composition reports for those nonconstruction federal contractors in Alameda County which are subject to Executive Order 11246; and the written affirmative action programs and compliance review reports of federal contractors with establishments in Alameda County that are assigned to the USDA for enforcement purposes. For the most part these disclosure claims have been resolved through settlement negotiations between the parties. As a result, plaintiffs have now agreed to dismiss the Legal Aid Society of Alameda County and its executive director as plaintiffs.

Since the original complaint was filed, plaintiffs have filed two amended complaints adding the United States Postal Service and General Services Administration and their officials responsible for administration of Executive Order 11246 as defendants and raising the same issues against them as are asserted against the USDA. Certain labor unions associated with the provision of trucking services to the Postal Service have also been added as defendants. In conjunction with these additional claims, two individuals and the National Association

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With respect to the third and fourth claims for relief, plaintiffs contend that defendants have failed to enforce Executive Order 11246 and the regulations issued pursuant to it in two respects: (1) they have failed to undertake any review whatsoever of the affirmative action programs of the majority of federal contractors, and (2) that where they have reviewed programs, they have approved ones which fail to comply with the executive order and regulations. Their motion for partial summary judgment deals only with the second contention.

These claims were previously the subject of defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted on the grounds of sovereign immunity, nonreviewability of discretionary agency action, and failure of plaintiffs to exhaust their administrative remedies. These motions were denied by the court May 31, 1973, but they have since been renewed by defendants, and their arguments are discussed more fully below.

Following the denial of defendants' motions to dismiss, plaintiffs obtained the affirmative action programs of some 27 USDA assigned contractors in Alameda County which were reviewed and approved during the period from August, 1972, through January, 1973. Following receipt of these programs, plaintiffs reviewed them and sent the USDA a lengthy and detailed memorandum specifying their claims that the programs as approved were in violation of the applicable regulations, specifically Revised Order Number 4, 41 C.F.R. Part 60-2 (1973), entitled, "Affirmative Action Programs." When no response was made, plaintiffs discussed the issues raised with

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for the Advancement of Colored People have been permitted to intervene as plaintiffs. None of these additional parties is involved in plaintiffs' motion for partial summary judgment presently before the court.

an attorney from the Department of Labor. Finally, after waiting over two months, plaintiffs brought the motion for partial summary judgment now pending before the court. As initially presented, the motion sought to restrain the USDA from approving affirmative action programs that are not in compliance with Executive Order 11246 and the regulations issued thereunder. A nationwide scope of relief was requested.

Since the motion was presented, the court has held two hearings and granted additional time for the USDA to present materials showing its compliance efforts. The USDA has since conducted or is conducting followup onsite reviews of all the contractors directly involved and issued a number of show cause orders.[6] Plaintiffs have narrowed the relief sought to include directions to disapprove the affirmative action programs of Alameda County contractors whose programs are shown to be in noncompliance with Revised Order Number 4, and to require of the USDA that any future approvals in Alameda County, comply with the Order. The relief sought includes a means of monitoring the USDA's operations by plaintiffs and the court. It is anticipated that if they succeed on this motion, plaintiffs will submit materials showing that the USDA's failings locally are duplicated elsewhere justifying nationwide relief. For the moment, however, the USDA's activities in Alameda County are directly under consideration. Before turning to the merits of plaintiffs' motion, the court will consider the procedural and other objections to the court's jurisdiction postulated by defendants.

II

It is important to distinguish at the outset that the basis of this action is not the claims of individuals against specific

[6] Upon a finding that a contractor has an unacceptable affirmative action program, the compliance agency is required to issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246 should not be instituted. 41 C.F.R. § 60-2.2(c) (1973).

contractors for failure to employ them in a certain job; rather it is an action seeking relief in the nature of mandamus to require federal officers to perform specific and clearly defined duties mandated by Executive Order 11246 and the regulations promulgated pursuant to the executive order.

Defendants argue that a mandamus action is inappropriate here under either the mandamus statute, 28 U.S.C. § 1361, or the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because the acts which plaintiffs seek to compel are committed to the discretion of the agencies involved, because this action is barred by the doctrine of sovereign immunity, and because Executive Order 11246 does not create a private cause of action.

[1] Defendants' principal contention is that Executive Order 11246 is not mandated by any Act of Congress or the Constitution, which therefore makes all federal agency actions taken pursuant to it discretionary and nonreviewable. On the other hand, executive orders clearly carry the force and effect of law if they are issued pursuant to constitutional or statutory authority. This particular executive order and its direct antecedents have consistently been held to be based on statutory authority resting with the President to provide for procurement, utilization, and management of government property. *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 166-171 (3d Cir.), cert. denied, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *Farkas* v. *Texas Instrument, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir.), cert. denied, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (1967).[7] There is no question that Executive Order 11246 also has firm foundations in the

[7] Thus, in issuing Executive Order 11246 on September 24, 1965, President Johnson declared in a preface to the order that the order was issued "[u]nder and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States." Exec.Order No. 11,246, 3 C.F.R. 169, 170 (1974).

fifth and fourteenth amendments to the Constitution and the several congressional enactments, including the comprehensive provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., intended to provide equal employment opportunities. This basis for Executive Order 11246 is implicitly recognized by defendants when they urge that plaintiffs be restricted to the procedures provided by the Civil Rights Act of 1964.

In contrast, the authorities relied upon by defendants, for example, *Manhattan-Bronx Postal Union* v. Gronouski, 121 U.S.App.D.C. 321, 350 F.2d 451 (D.C.Cir.1965), involve executive orders which essentially deal with "housekeeping" functions strictly within the purview of the executive department. *Gronouski* involved the recognition status for federal employee organizations. As the court pointed out:

> Executive Order 10988 represents in essence a formulation of broad policy by the President for the guidance of federal employing agencies. It had no specific foundation in Congressional action, nor was it required to effectuate any statute. It could have been withdrawn at any time for any or no reason. It represented simply one President's effort to move in the direction of what he had been advised by his experts would be an improvement in the efficiency of federal employment.

350 F.2d at 456. The history of Executive Order 11246 and its basis in the constitutional and statutory provisions noted above make *Gronouski* wholly distinguishable from this action.

[2] Hence, the court concludes that Executive Order 11246 was issued pursuant to constitutional and statutory authority, and has the full force and effect of law. It is axiomatic that regulations issued pursuant to such an executive order also carry the force and effect of law. *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Service* v. *Dulles*, 354 U.S. 363, 372, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957).

Next, defendants urge that whatever effect these regulations have, approval and review of federal contractor's affirmative action programs are not mandatory, but discretionary duties, which unenforceable in a mandamus-type proceeding.

This argument is amply refuted by the language of the regulations themselves. As noted above, Executive Order 11246 requires companies having federal contracts to:

> take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.

§ 202(1), 3 C.F.R. 169, 170 (1974). The requirements of this "affirmative action" are spelled out in detail in regulations issued by the OFCC, which also set forth the responsibilities of the enforcement agency. These duties include requiring certain federal contractors to adopt affirmative action programs:

> (a) *Requirement of programs.* Each agency . . . shall require each prime contractor who has 50 or more employees and a contract of $50,000 or more . . . to develop a written affirmative action compliance program for each of its establishments.

41 C.F.R. § 60-1.40 (1973). Revised Order Number 4, 41 C.F.R. Part 60-2 (1973), then sets forth the detailed requirements governing the contents of these affirmative action programs and the steps which the compliance agency must take whenever a contractor's program does not satisfy the requirements of Revised Order Number 4. 41 C.F.R. § 60-2.2(c) (1973) requires the compliance agency to initiate enforcement proceedings immediately when a contractor's program is found insufficient or nonexistent:

> (c) Immediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has

> made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

See also 41 C.F.R. §§ 60-1.20(c), 60-2.1 & 60-2.2(a) (1973).

As pointed out by the District of Columbia circuit in Adams v. Richardson, 156 U.S.App.D.C. 267, 480 F.2d 1159 (D.C.Cir. 1973), the agency discretion exception to the general rule that agency action is reviewable is a narrow one, applicable only where the statute and regulations are so broadly drawn there is no law to apply. *Id.* at 1161-62. Executive Order 11246 and the regulations issued thereunder provide detailed and specific guidance to determine the required content of affirmative action programs, and even these regulations have been further explicated by the OFCC.[8]

[3] Furthermore, the appropriate compliance agency response is provided for in affirmative and mandatory language, as set out above. Under these circumstances, defendants are charged with an enforceable legal duty to disapprove affirmative action programs which do not comply with Revised Order Number 4.

Nevertheless, defendants argue the actions taken by the OFCC and the USDA are not reviewable in this court because this is an unconsented suit against the United States and barred by the doctrine of sovereign immunity. *Larson* v. *Domestic &*

[8] On February 22, 1974, Philip J. Davis, Director of the Office of Federal Contract Compliance, United States Department of Labor, signed and promulgated to the compliance agencies "Technical Guidance Memo No. 1 on Revised Order No. 4," the relevant portions of which are cited by the court where applicable to the interpretation of certain sections of Revised Order Number 4, *infra*.

Foreign Corp. 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). *Dugan* v. *Rank*, 372 U.S. 609, at 620, 83 S.Ct. 999, at 1006, 10 L.Ed.2d 15 (1963), states the doctrine as follows:

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." (citations omitted)

[4] Therefore, this suit is barred by the doctrine of sovereign immunity unless it falls within one of the exceptions recognized by these same cases. Plaintiffs' main contention is that the OFCC and the USDA officers have taken improper action and failed to act where clearly required to do so by regulations having the force and effect of law in approving programs which violate the requirements of Revised Order Number 4. Such a claim clearly falls within the ultra vires exception to the bar of sovereign immunity. As stated in *Larson:*

> where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

337 U.S. at 689.

Since plaintiffs allege that the federal defendants have violated a plain legal duty imposed by valid regulations properly issued, and since whatever burden which might be imposed on the federal officials involved is outweighted by the gains anticipated through vigorous enforcement of Executive Order 11246,[9] the court has jurisdiction to review the chal-

[9] Footnote 11 of the Court's opinion in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 691 n. 11, 69 S.Ct. 1457, 93

(footnote continued on following page)

lenged actions of these government officials on the merits pursuant to 5 U.S.C. §§ 701-706; 28 U.S.C. § 1361; and 28 U.S.C. § 1331.[10] *See State of Washington* v. *Udall* 417 F.2d

(footnote concluded from preceding page)
L.Ed. 1628 (1949), announces what several courts have interpreted as an exception to the ultra vires exception to the doctrine of sovereign immunity:

> [11] Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U.S. 22, 10 S.Ct. 509, 33 L.Ed. 849 (1890).

The ninth circuit has not interpreted this footnote to mean that a suit must fail if, as here, portions of the relief sought "require affirmative action by the sovereign." State of Washington v. Udall, 417 F.2d 1310, 1317 (9th Cir. 1969). Instead such suits must be dismissed as suits against the government only where "the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm." *Id.* at 1318.
In this case, the USDA officials involved have previously indicated their willingness to abide by the newly issued Technical Guidance Memo from the OFCC which incorporates the interpretation of Revised Order Number 4 that plaintiffs advocate. Thus, the relief requested will not work any intolerable burden on these officials. Moreover, vigorous enforcement of the executive order and regulations should produce significantly expanded employment opportunities for minority groups and women, and to the extent that truly equal employment opportunities are created, all elements of the population and the government itself will benefit. Hence, footnote 11 of the *Larson* opinion does not create any additional obstacle to either the court's jurisdiction or the relief sought by plaintiffs.

[10] Since the employment opportunities that would be provided by strict enforcement of the executive order and

(footnote continued on following page)

1310 (9th Cir. 1969) (ultra vires exception applies where plaintiffs alleged federal officials acted beyond their delegated authority by violating a plain legal duty). *See also* Adams v. Richardson, *supra.*

Finally, defendants argue that the executive order does not create a private right of action against either government officials or private contractors, relying on *Blaze* v. *Moon*, 440 F.2d 1348 (5th Cir. 1971); *Gnotta* v. *United States*, 415 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934, 90 S.Ct. 941, 25 L.Ed.2d 115 (1970); *Farkas* v. *Texas Instrument, Inc.*, *supra; Farmer* v. *Philadelphia Electric Co.*, 329 F.2d 3 (3d Cir. 1964); and *CORE* v. *Commissioner*, 270 F.Supp. 537 (D.Md.1967). These cases were private suits by individuals seeking relief from or employment with specific government contractors, using various theories employing Executive Order 11246. The present action, however is a suit against the officials of the federal compliance agencies to require them to comply with their statutory enforcement duties. *See Adams* v. *Richardson*, *supra.* None of the plaintiffs in this action seeks a particular job with a specific contractor. Indeed, the action is solely directed against federal officials vested with enforcement duties under Executive Order 11246. Without indicating any approval of the holdings in those cases cited by defendants, they are simply inapplicable to this action.

III

Defendants also argue that plaintiffs have failed to exhaust their administrative remedies set out in 41 C.F.R. § 60-1.21 et seq. (1973). The regulations in question provide that, "[a]ny employee of any contractor or applicant for employment with

(footnote concluded from preceding page)
regulations have a value well in excess of $10,000, jurisdiction also exists under the general federal question statute.

such contractor may, . . . file in writing a complaint of alleged discrimination in violation of the equal opportunity clause." 41 C.F.R. § 60-1.21 (1973). The regulations go on to prescribe the proper place to file the complaint, § 60-1.22, its contents, § 60-1.23, procedures for investigating and informally resolving the complaint, § 60-1.24, hearings in appropriate cases, § 60-1.26, and authority where necessary to impose the sanctions described in subsections 209(a)(1), (5), and (6) of Executive Order 11246, which include cancellation of government contracts. 41 C.F.R. § 60-1.27 (1973). *See also* 41 C.F.R. § 60-1.26(b)(2)(v) (1973). It is undisputed that none of the named plaintiffs have filed such complaints against any of the 29 contractors[11] whose affirmative action programs are before the court.

[5] Defendants' argument, however, is based on a misconception of the nature of this action which was discussed previously in considering defendants' claim that no private right of action exists under the executive order. Plaintiffs have steadfastly insisted, and the court is persuaded, that the crux of this action is not complaints of specific acts of discrimination against the named private contractors. Rather, it is based upon the failure of the federal compliance agencies to require federal contractors to undertake meaningful affirmative action in the employment of minorities and women. The complaint procedure outlined above is designed only to deal with complaints by individuals against the actions of specific companies. The regulations contain no administrative procedures for challenging the actions of the federal enforcement agencies themselves. There are no remedies for plaintiffs to exhaust in this area.

Nevertheless, plaintiffs did file an extensive memorandum with exhibits attached with defendants on September 5, 1973, to which defendants have made no direct response. The memorandum specifically presented plaintiffs' claims that the 27 (now 29) affirmative action programs were deficient in

[11] See note 12, *infra*.

virtually every significant respect. These claims form the substance of plaintiff's subsequently noticed motion for summary judgment, to which the court now turns.

IV

The essence of plantiffs' motion for partial summary judgment is that each of the 29 affirmative action programs[12] approved by the USDA in Alameda County during the period from August, 1972, to January, 1973, was in violation of the legal requirements for such programs as set out in the applicable regulations, particularly Revised Order Number 4, 41 C.F.R. Part 60-2 (1973).

[6] Since defendants admit that the affirmative action programs of all 29 contractors were initially reviewed and approved by the USDA during the period specified above, the remaining issues before the court are: (1) whether the programs so approved were in substantial compliance with Revised Order Number 4, and (2) if not, whether the failure of the USDA to enforce the regulations and orders issued pursuant to Executive Order 11246, is excusable, precluding entry of summary judgment and the relief sought by plaintiffs.

Plaintiffs have made a thorough and convincing showing that each of the 29 affirmative action programs approved by the USDA for Alameda County contractors in in violation of the regulations in one or more of the following respects: (1) they contain inadequate utilization analyses which are designed to

[12] As noted above, defendants originally supplied plaintiffs with 27 affirmative action programs approved by the USDA for Alameda County contractors during 1972-1973. In response to this motion for summary judgment, defendants submitted additional materials in connection with the 27 programs previously supplied and two additional programs of Alameda County contractors approved during the same general time period—Coca-Cola Bottling Co. and Sunshine Biscuits, Inc. Plaintiffs then modified their claims for relief to include all 29 of the affirmative action programs which are before the court.

show each job category in which the contractor is deficient in the utilization of minority persons and women, 41 C.F.R. § 60-2.11 (1973), (2) they fail to establish adequate goals and timetables designed to correct each deficiency within the minimum period necessary, 41 C.F.R. §§ 60-2.10, 60-2.12 & 60-1.20(b) (1973); and (3) they fail to include additional ingredients required by Revised Order Number 4, 41 C.F.R. § 60-2.13 (1973).

1. Inadequate Utilization Analyses

Revised Order Number 4 requires that each affirmative action program contain a detailed and specific utilization analysis showing each job category in which the contractor is deficient in the utilization of minorities and women.[13] The relevent portion of the regulation provides:

> Affirmative action programs must contain the following information:
>
> (a) An analysis of all mojor job classifications at the facility, with explanation if monorities or women are currently being underutilized in any one or more job classifications (job "classification" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job classification than would reasonably be expected by their availability. In making the work force analysis, the contractor shall conduct such analysis separately for minorities and women.

41 C.F.R. § 60-2.11 (1973).

This utilization analysis is the basic element of the affirmative action program since it identifies the job categories in which

[13] This utilization analysis must be done for every minority group exceeding 2% or more of the labor area and women. Technical Guidance Memo. *supra*, at (4) Underutilization Analysis.

more minorities and women must be hired in order to meet the affirmative action requirements of Executive Order 11246. Plaintiffs contend that by virtue of the eight separate factors required by Revised Order Number 4 to be considered by the contractor in determining whether minorities or women are being underutilized in any job classification,[14] a proper utilization analysis by a contractor requires five stages: first, a determination of the appropriate labor area; second, a factual analysis of each of the eight factors; third, based on that analysis, a determination of the availability of minorities and women for employment within that category; fourth, the contractor must set forth the ethnic and sexual composition of his current work force within that category; and fifth, if the

[14] 41 C.F.R. § 60-2.11(a) (1973) provides:

> (1) In determining whether minorities are being underutilized in any job classification the contractor will consider at least all of the following factors:
>
> (i) The minority population of the labor area surrounding the facility;
>
> (ii) The size of the minority unemployment force in the labor area surrounding the facility;
>
> (iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;
>
> (iv) The general availability of minorities having requisite skills in the immediate labor area;
>
> (v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;
>
> (vi) The availability of promotable and transferable minorities within the contractor's organization;
>
> (vii) The existence of training institutions capable of training persons in the requisite skills; and
>
> (viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

41 C.F.R. § 60-2.11(a)(2) (1973) requires the contractor to consider the same eight factors in determining whether women are being underutilized in any job classification.

percentage of minorities or women available in any category exceeds the percentage of minorities or women employed in that category, the contractor must designate that category as a deficiency category. Plaintiffs concede that most of the affirmative action programs submitted contain the fourth stage—the ethnic and sexual composition of the contractor's work force. However, they claim none of the programs contains an adequate analysis of the other four stages.

Plaintiffs first contend that the Alameda County contractors define the appropriate labor area to minimize the available minority percentages, and that they use inconsistent and contradictory definitions of the relevant labor area. For example, Southern Alameda County contractors frequently exclude the predominately urban nonwhite areas in the northern part of the county within commuting distance from the labor area definition, while the Northern Alameda County contractors define the relevant labor area as the entire San Francisco-Oakland Standard Metroplitan Statistical Area (SMSA)[15] which contains a lower minority population than the local area. Some of the programs contain no definition of the relevant labor area.

Defendants do not deny that the definitions of relevant labor areas approved are contradictory or that they minimize the minorities available. They claim only that plaintiffs are seeking a definition of the labor area which exaggerates the relevant minority population. Revised Order Number 4 requires that the contractor use the "immediate labor area" or the "labor area surrounding the facility" to define the relevant labor area. 41 C.F.R. § 60-2.11 (1973). As explicated by defendant Davis, "Both terms refer to the local area within which the contractor can reasonably expect people to commute." Statement of Philip J. Davis, Director, OFCC, issued August 8, 1973. Defining the labor area as roughly the

[15] The San Francisco-Oakland SMSA includes all of San Francisco, Contra Costa, Marin, and San Mateo Counties.

commuting area thus substantiates plaintiffs' position that defendants have uniformly approved definitions both overinclusive and underinclusive which raise serious questions about the minority percentages obtained thereby.

Defendants do not dispute plaintiffs' contention that none of the USDA approved programs contains an analysis of the eight factors for any job category, a contention which receives support from the OFCC's own "Technical Guidance Memo No. 1 on Revised Order No. 4." [Technical Guidance Memo][16] For example, the Memo states that the required utilization analysis should include "evaluation of opportunities through training and recruitment" as part of an expanded concept of occupational availability.[17]

[16] Defendants object to any reliance on the Technical Guidance Memo, issued February 22, 1974. (see note 8, *supra*) to show that the Alameda County programs were in noncompliance with Revised Order Number 4 and therefore illegal when approved by the USDA, since the Technica' Guidance Memo was promulgated subsequent to the approvals in question. The Technical Guidance Memo, however, does not purport to be anything more than a clarification of the standards contained within Revised Order Number 4 which have been in effect throughout the period when the approvals were granted. To this extent, it merely supports plaintiffs' position regarding what Revised Order Number 4 always required, and indicates that the USDA applied improper standards and criteria under Revised Order Number 4.
Plaintiffs' showing is complete without any need to resort to the Technical Guidance Memo, and some of the deficiencies cited by plaintiffs are independent of any particular set of standards, for example, the USDA's approval of programs with inconsistent and contradictory labor area definitions and their failure to provide any review of contractors' projections of job openings. Since the USDA states it now intends to comply with the guidelines contained in the Technical Guidance Memo, defendants and plaintiffs appear to be in agreement on the correct standards to apply in the future, and thus the prospective relief granted by the court should not impose any intolerable burdens on defendants. See note 9, *supra*.

[17] *Technical Guidance Memo*, at (3) Availability Analysis.

None of the programs approved by USDA contains a determination of the specific availability of minorities and women for each job as required by 41 C.F.R. § 60-2.11(a) (1973) and *Technical Guidance Memo,* at (3) Availability Analysis, a fact that is not disputed by defendants.

Defendants also do not dispute that none of the approved affirmative action programs identify those job categories where, after the availability of minorities and women is compared with the actual ethnic and sexual composition of the contractor's work force, underutilization is actually found to exist. 41 C.F.R. § 60-2.11(a) (1973); *Technical Guidance Memo,* at (4) Underutilization Analysis. This identification is essential to the establishment of specific goals for each such underutilization, the next general requirement of Revised Order Number 4.

2. Improper Goals and Timetables

Revised Order Number 4 requires that contractors' affirmative action programs contain a number of goals and timetables designed to correct each deficiency in utilization of minorities and women within the minimum feasible period. These requirements are first set out in 41 C.F.R. § 60-2.10 (1973):

> An acceptable affirmative action program must include . . . goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

See also 41 C.F.R. § 60.2.12(g) (1973).[18] Revised Order Number 4 makes it incumbent upon the contractor to assert "every good faith effort" in designing the goals:

> Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results

[18] (G) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

> which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work.

41 C.F.R. § 60-2.12(a) (1973). *See also* 41 C.F.R. § 60-1.20(b) (1973).

Plaintiffs contend that these regulations require the establishment of both an ultimate goal—correction of the deficiency—and adequate intermediate goals—specific commitments to demonstrate the contractor's good faith efforts at achieving the ultimate goal.

Most of the affirmative action programs approved fail to establish any ultimate goal. Instead they generally establish a one year numerical hiring goal based upon the contractor's own projections of job openings during the coming year. Plaintiffs contend that these annual goals are inadequate in that they neither set forth the percentage needed to correct the contractor's deficiencies in the employment of minorities and women, nor do they commit the contractor to doing so. Apparently, the USDA's practice is to require only annual goals. By utilizing this practice, however, the USDA in fact concedes that it requires no meaningful commitment of the contractors, since it has conducted under 800 compliance reviews each year for the past three years of the more than 18,000 contractors assigned to it for supervision. At this rate, each contractor would be reviewed once every 22½ years, making the requirement of annual goals ludicrous. In addition to the lack of ultimate goals, none of the programs approved established a timetable for reaching the ultimate goal.

The USDA's answer to plaintiffs' contentions is that the regulations do not specifically require any such "ultimate goals." The OFCC, however, rejects this interpretation of the regulations which requires only annual goals, and instead requires:

> (1) A goal must be established for each job group in which underutilization exists and must be designed to

completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available in the job group in the applicable labor market.

(2) for each job category in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

Technical Guidance Memo at 3.

This interpretation of Revised Order Number 4 is substantially identical to what plaintiffs have claimed and is now accepted by the USDA. Hence, the USDA has virtually admitted that its failure to require these goals in the affirmative action programs approved in the past was tantamount to a violation of Revised Order Number 4.

In addition, plaintiffs contend that the annual goals system adhered to by the USDA, which allowed contractors to project the number of job openings in the forthcoming year and then to anticipate the number of minorities and women that would be hired, is inadequate even as an intermediate goal. They note that if openings are seriously underprojected, and there is considerable evidence of this in the affirmative action programs themselves,[19] when the actual job openings exceed the projections, these additional openings will not be covered by the previously set minority and female hiring goals. Thus,

[19] For example, Del Monte Plant 57 and Dole Company projected zero (0) job openings in every job category and therefore set no minority or female hiring goals at all. Kockos Brothers, Inc., which projected 19 new job openings from August, 1972, to August, 1973, had 63 job openings the previous year. During the first four months of the projected period, September 1, 1972, to January 1, 1973, the company hired 21 new employees, and thus had more job openings within that period than it had projected for the entire year.

plaintiffs argue, to be effective the regulations must anticipate using percentage hiring goals for women and minorities, not the job openings projections of contractors. Anything less would eviscerate the requirement of section 60-2.12(g) that, "Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies." The USDA's practice challenged by plaintiffs as at odds with Revised Order Number 4 has since been expressly rejected by the OFCC:

> Some agencies have interpreted required goals too narrowly to mean only an annual goal. . . .
>
> (3) For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals.

Technical Guidance Memo. Part II, at (3). Accordingly, there is no longer any question that the programs uniformly approved by the USDA were not in compliance with Revised Order Number 4.

Furthermore, the programs approved by the USDA demonstrably fail to set out any intermediate goal, any timetable, or any ultimate goal beyond the one year projections initially required. Without annual reviews, there is no question that this approach is a totally inadequate method of achieving compliance with Revised Order Number 4's requirement that contractors "put forth every good faith effort" to correct any deficiencies in utilization of minorities and women. In fact, some of the USDA programs approved for Alameda County

contractors did not even set one year goals designed to achieve any progress in correcting utilization deficiencies.[20]

The USDA's failure to carry out its responsibilities under Executive Order 11246 by approving programs with these glaring inadequacies cannot be explained away by defendant Gladden's fear that percentage goals would impose inflexible and illegal quotas on the contractors. Perhaps the best indication of the USDA's failure to carry out its responsibilities is the rejection of its methods and interpretation of Revised Order Number 4 by the federal agency in charge of overall enforcement of the executive order and which promulgated the regulations—the OFCC—in its Technical Guidance Memo.

3. Failure to Include Required "Additional Ingredients"

Finally, plaintiffs contend that the affirmative action programs approved by the USDA in Alameda County consistently fail to include certain "additional ingredients" required in addition to the utilization analysis and goals and timetables required by Revised Order Number 4. These additional ingredients are set out in 41 C.F.R. § 60-2.13 (1973).[21] Plain-

[20] For example, the Golden Grain Macaroni Company had projected job openings of 7 Skilled Craftsmen and 4 Operatives during 1972-1973, but did not project hiring any minorities for those positions. The Kellogg Company and Ghirardelli Chocolate Company projected minority hiring at only 20% in all their job categories.

[21] § 60-2.13 *Additional required ingredients of affirmative action programs.*

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(footnote continued on following page)

tiffs specify four areas in which they claim the USDA programs are especially deficient: (1) commitment to, and the means for, implementing affirmative recruitment of minorities and women, 41 C.F.R. § 60-2.13(f), (i), & (j) (1973); (2) goals based in part upon the contractors' good faith efforts to train minorities and women, 41 C.F.R. § 60-2.11(a)(1)(viii), (2)(viii), 41 C.F.R. § 60-2.13(f) (1973), including in-house training programs, and use of training facilities available in the community; (3) support for community-based programs designed to improve employment opportunities of minorities and women, 41 C.F.R. § 60-2.13(i) (1973); and (4) development and implementation of internal audit and reporting systems to enable contractors to measure the effectiveness of their total programs, 41 C.F.R. § 60-2.13(g) (1973). The requirement

(footnote concluded from preceding page)

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job classification.

(e) Establishment of goals and objectives by organizational units and job classification, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 C.F.R. Part 60-20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the work force having requisite skills who can be recruited through affirmative action measures.

that any affirmative action program must include these ingredients in order to comply with Revised Order Number 4 was recently affirmed by the OFCC in its Technical Guidance Memo, Part II, at (4):

> Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contract and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

Moreover, the USDA does not dispute plaintiffs' claim that they have consistently approved affirmative action programs which fail to contain these ingredients. Their response that they cannot compel a company to adopt any specific program does not meet plaintiffs' contention and does not justify approval of affirmative action programs which do not include concrete action oriented programs as required by Revised Order Number 4, 41 C.F.R. § 60-2.13 (1973).

V

In conclusion, therefore, to the extent that the material facts with regard to plaintiffs' motion for partial summary judgment consist of the affirmative action programs themselves which were approved by the USDA, there is no factual dispute. The USDA does not seriously contest plaintiffs' claim that the 29 programs it approved in Alameda County were not in compliance with even the most fundamental requirements of Revised Order Number 4.

The course of the USDA's actions subsequent to the filing of this case further substantiate plaintiffs' claims that the USDA approved flagrantly inadequate affirmative action programs. After plaintiffs questioned the propriety of the USDA's initial approvals, the USDA and OFCC began a review of the 29 Alameda County contractors' affirmative action programs. By mid-March, 1974, this review resulted in issuance of eight show cause notices and six conciliation meetings were conducted. Thus, even the USDA, upon closer analysis, recognized that its earlier approvals were in error. Ordinarily, this subsequent review activity would be an encouraging sign indicating that future compliance with the mandates of Revised Order Number 4 might be achieved without judicial intervention . However, the affidavit of William Gladden, *supra*, shows that these auspicious developments have been achieved only by distorting the USDA's entire review program. Since February, 1972, only three show cause orders have been directed by the USDA to companies unrelated to the 29 Alameda County contractors whose programs are the subject of this litigation; all the show cause orders issued in 1974 have been issued to the Alameda County contractors. Hence, this distortion of the USDA's efforts cannot be taken to demonstrate that the previous course of pro forma review of affirmative action programs so amply demonstrated by plaintiffs will not continue in the future when the attention directed by this lawsuit is removed.

[7] Therefore, injunctive relief is appropriate as a means of assuring compliance by defendants with their own regulations, and necessary because there is a clear danger that the illegal and improper approvals of noncomplying affirmative action programs will continue unless defendants are restrained from repetition of their past unlawful review, and because there is no adequate remedy at law or any remedy of any kind whatsoever which can correct defendants' actions.

Accordingly, the court will direct entry of partial summary judgment in favor of plaintiffs regarding the 29 Alameda

County contractors whose programs were previously approved by the USDA. Defendants Butz and Gladden will be restrained from approving affirmative action programs which do not contain adequate utilization analyses, goals and timetables, and action oriented programs. These defendants will be further ordered to rescind their approval of those affirmative action programs of contractors that plaintiffs have shown to contain serious and demonstrably inadequate elements required by Revised Order Number 4 and to institute enforcement proceedings against those companies. Finally, to insure compliance with the court's mandate, until further order of the court defendants will be required to submit to the court and counsel for plaintiffs copies of any additional affirmative action programs approved by the USDA for Alameda County contractors along with supporting papers within 15 days of their approval.

Plaintiffs shall submit findings and an appropriate order in accordance with the court's ruling.

APPENDIX III

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,

Plaintiffs,

vs.

PETER J. BRENNAN, Secretary of the United States Department of Labor, et al.,

Defendants.

No. C-73-0282 AJZ

ORDER

IT IS HEREBY ORDERED that:

(1) Defendants BUTZ and GLADDEN, their successors, agents, subordinates, and assigns, are restrained from approving affirmative action programs of contractor establishments located in Alameda County, California unless those programs satisfy Revise Order No. 4. Specifically, such programs shall not be approved unless they satisfy the following criteria:

(a) Each program must contain a utilization analysis that satisfies each of the following requirements:

(i) The analysis *must* include a list of all major job categories (hereinafter referred to as "job groups") in the contractor's work force and, for each such job group, a statement of the total number of male and female incumbants and, further, a statement of the number of male and female incumbants for each of the following ethnic groups: Blacks, Spanish-Surnamed Americans, American Indians and Orientals.

(ii) Minority and female "availability" must be separately analyzed for each job group. The availability analysis must include a statement of the specific percentages of minority persons (stated separately for Blacks, Spanish-Surnamed Americans, American Indians and Orientals) and minority and non-minority women determined to be available in the applicable labor area for each job group.

(iii) Whenever the percentage of total minorities or of any ethnic group exceeding 2% of the surrounding population or of women in a job group is lower than the percentage of such persons available in that job group within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that job group.

(iv) For purposes of determining availability, the labor area must not be defined in such a way as to minimize the availability of minorities or women. In defining the relevant labor area, the contractor must set forth statistics showing the ethnic and sexual composition (including specific data for the four minority ethnic groups) of the population of the Standard Metropolitan Statistical Area, county and city in which the establishment is located and other appropriate adjacent areas. Any program which adopts a labor area which has a minority population lower than the highest of the SMSA, county or city must be rejected unless the program provides an appropriate written justification for the use of such area.

(b) Each program must contain goals and timetables which satisfy each of the following requirements:

(i) An ultimate goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The ultimate goal must be stated as a percentage of the total employees in the job group and must be at least equal to the percentage of minorities or women available for work in the job group in the labor market.

(ii) For each job group in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(iii) For each job group in which underutilization exists, the contractor must establish rates for hiring or promoting the minorities and women. The rates must be stated as a percentage of new placements in the job group, and they must remain in effect (unless specifically modified on the basis of subsequent data) until the underutilization is completely corrected. The percentage rates must be the maximum rates that can be achieved through the contractor's putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentages set in the ultimate goals. Numerical goals based on projected openings are permissible but cannot be used in place of percentage rates.

(c) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with the requirements of Revised Order No. 4. These programs must, at a minimum, commit the contractor to undertake every good faith effort to contact and use in some concrete and specific manner relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the contractor itself and related to the locality.

(2) Defendants BUTZ and GLADDEN shall rescind their approval of the affirmative action programs described in paragraphs 20 through 29 and issue show cause notices to each of the contractors which submitted those programs. Copies of the show cause notices shall be submitted to the Court and to counsel for plaintiffs. If, after the 30 day show cause period has run, any contractor has failed or refused to develop and implement an affirmative action program that complies with

Revised Order No. 4 and this order, defendants BUTZ and GLADDEN shall undertake enforcement proceedings pursuant to 41 C.F.R. § 60-2.2(c)(1).

(3) Subsequent to the date of this order, whenever defendants BUTZ and GLADDEN their successors, agents, subordinates or assigns approve an affirmative action program of a contractor establishment in Alameda County, they shall within fifteen days of such approval submit to the Court and to counsel for plaintiffs a copy of the approved program together with the letter of approval, the compliance review report and supporting data.

DATED: June 20, 1974

ALFONSO J. ZIRPOLI
UNITED STATES DISTRICT JUDGE

APPENDIX IV

Executive Order 11246

30 FED. REG. 12319 (1965)
32 FED. REG. 14303 (1967)

PART II—Nondiscrimination in Employment by Government Contractors and Subcontractors

SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employ-

ment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or

suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

APPENDIX V

Revised Order No. 4

41 C.F.R. § 601-2 (1977)
43 FED. REG. 49240 (1978)

Subpart A—General

§ 60-2.1 Title, purpose and scope.

(a) This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this chapter, affirmative action compliance programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonable be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, develop a written affirmative action compliance program for each of its establishments. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then sets forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C of this part are concerned with affirmative action plans only.

(b) Relief, including back pay where appropriate, for members of an affected class who by virtue of past dis-

crimination continue to suffer the present effects of that discrimination, shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of this title. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

[42 FR 3461, Jan. 18, 1977]

§ 60-2.2 Agency action.

(a)(1) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 FR 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the employment opportunity clause. An affirmative action plan shall be deemed to have been accepted by the Government at the time appropriate compliance agency has accepted such plan unless within 45 days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(2) The appropriate compliance agency shall notify the contractor and the Office of Federal Contract Compliance when it has accepted an affirmative action plan.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance Programs or other Government agencies, that the contractor has no affirmative action program at each of his establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action

program which complies with the regulations in this chapter, the contracting officer shall declare the contractor-bidder nonresponsible and so notify the contractor, the Director, and the compliance agency unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Director to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request shall set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Director may require the compliance agency to develop the investigation or compliance review further or to conduct additional conciliation: *Provided*, That during any preaward conferences, every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further*, That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause, the compliance agency shall promptly send to the Director a written request that enforcement proceedings be initiated pursuant to § 60-1.26. Such request for initiation of enforcement proceedings shall be sent to the Director no later than the date of issuance of the second non-responsibility determination.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from

an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, the compliance agency representative or the representative of the Office of Federal Contract Compliance Programs, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance Programs of such fact. Whenever administrative enforcement is contemplated, the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation or opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request

for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with Part 60-30 of this chapter.

(3) During the "show cause" period of 30 days, every effort will be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency shall promptly send to the Director a written request for enforcement proceedings pursuant to § 60-1.26 of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[38 FR 2970, Jan. 31, 1973, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb. 1, 1977]

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and

women, at all levels and in all segments of his work force where deficiencies exist.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974]

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: Officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semi-skilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) Workforce analysis which is defined as a listing of each job title as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage

rates or salary ranges. For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

(b) An analysis of all major job groups at the facility, with explanation if minorities or women are currently being underutilized in any one or more job groups ("job groups" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. In making the utilization analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job group, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

[36 FR 23152, Dec. 4, 1971, as amended at 39 FR 5630, Feb. 14, 1974, 39 FR 25654, July 12, 1974]

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written

affirmative action program and shall be maintained at each establishment of the contractor.

(j) A contractor or subcontractor extending a publicly announced preference for Indians as authorized in 41 CFR 60-1.5(a)(6) may reflect in its goals and timetables the permissive employment preference for Indians living on or near an Indian reservation.

(k) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in § 60-2.11 and must detail his reason for a lack of a goal.

(l) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(m) Support data for the required analysis and program shall be complied and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(n) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

[36 FR 23152, Dec. 4, 1971, as amended at 42 FR 3462, Jan. 18, 1977; 42 FR 5978, Feb 1, 1977]

APPENDIX VI

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Federal Contract Compliance
WASHINGTON, D.C. 20210

In Reply Refer To: 4228-3

MEMORANDUM

TO: ALL CONTRACT COMPLIANCE OFFICERS

FROM: PHILIP J. DAVIS
Director

SUBJECT: Technical Guidance Memo No. 1 on Revised Order No. 4

The purpose of this memo is to give specific guidance on the proper interpretation on certain selected issues that have been or continue to be raised regarding Revised Order 4. Agencies are expected to implement these interpretations when reviewing affirmative action programs. Further guidance memos will be issued and serially numbered for your retention.

Each affirmative action program must contain an analysis that satisfies each of the following requirements:

(1) Workforce analysis which is defined as a listing of each job classification as appears in applicable collective bargaining agreements or payroll records (not job group) ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision. If there are separate work units or lines of progression within a department a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line. For each job classification, the total number of male and female incumbents, and the total number of

male and female incumbents in each of the following groups must be given: Blacks, Spanish-surnamed Americans, American Indians, and Orientals. The wage rate or salary range for each job classification should be given. All job classifications, including all managerial job classifications, must be listed.

(2) Identification of Job Groups. After the workforce analysis is presented, job classifications may be grouped for the purpose of further analysis. Job groups should be composed of one or more jobs having similar content, wage rates and opportunities. Jobs with clearly different utilization patterns should not be grouped together (e.g., grouping predominantly male clerical jobs with predominantly female clerical jobs should be avoided). Job groups should relate to the data on availability. When data on detailed skills is available more detailed job groups can be used. If promotion through progression lines is rigid, and hiring above entry level is the rare exception, the subsequent availability analysis should be conducted on either entry level positions, or based upon skill requirements for those positions which the majority of employees could be expected to reach within five years or less after employment, and these jobs should be identified as job groups.

(3) Availability Analysis. Minority and female availability must be separately analyzed for each job group. The affirmative action program should include the specific percentages of minority persons (stated separately for Blacks, Spanish Surnamed Americans, American Indians and Orientals) and minority and non-minority women determined to be available in the applicable labor area for each job group.

A separate analysis must be prepared for each job group.

An exception may be made for production workers if it is concluded that utilization requirements will be similar for all units in production activities. A separate analysis will be required for maintenance employees, and likely individual analyses will be needed for individual crafts.

Analysis should be based upon local state employment security agencies' *Manpower Information for Affirmative Action Programs* data which is now available in most localities. The specific figures shown in Tables I, II, and III in those releases can be used in the analysis of population, workforce, unemployment, skill availability. Current occupations of employed persons indicated in Table III should at no time be considered the only basis for utilization, but must be expanded by evaluation of opportunities through training and recruitment.

(4) Underutilization Analysis. Whenever the percentage in a job or group of jobs of total minorities, or of any minority group exceeding 2% or more of the labor area, or of women is lower than the percentage of such persons available in that job category within the applicable labor area, the affirmative action program must specifically state that underutilization exists in that category.

Some agencies have interpreted required goals too narrowly to mean only an annual goal. Where underutilization exists and wherever numbers or percentages are relevant in developing corrective action, each program must contain goals and timetables which satisfy each of the following requirements:

(1) A goal must be established for each job group in which underutilization exists and must be designed to completely correct the underutilization. The goal must be stated as a percentage of the total employees in the job group and must be equal to the percentage of minorities or women available for work in the job group in the applicable labor market.

A single goal for minorities is acceptable, unless, through the company's evaluation it is determined that one minority is underutilized in a substantially disparate manner, in which case separate goals and timetables for such minority groups may be required individually, and it may further be required, where appropriate, that separate goals be established within the minority groups by sex. (See Order 4, 60-2.12(k).)

(2) For each job category in which underutilization exists, a specific timetable must be established for reaching the ultimate goal in the minimum feasible time period.

(3) For each job category in which underutilization exists, the contractor must establish annual rates of hiring and/or promoting minorities and women until the ultimate goal is reached. These rates should be the maximum rates that can be achieved through putting forth every good faith effort, including the use of available recruitment and training facilities, and must not be lower than the percentage rate set in the ultimate goal. Numerical goals based on projected openings are required but cannot be used in place of percentage goals.

(4) Each program must contain specific and detailed action oriented programs, including recruitment and training programs, which comply with Revised Order 4. These programs must, among other required ingredients, commit the contractor to undertake every good faith effort to contact and make use of relevant recruitment and training resources available in the community and to use its own resources for recruiting and training minorities and women to fill positions in job groups where underutilization exists. Data regarding promotable employees, community training facilities and company training facilities must be prepared by the company itself, and related to the locality.

APPENDIX VII

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

FIRESTONE SYNTHETIC RUBBER AND LATEX COMPANY'S FACILITY IN ORANGE, TEXAS

Case No. 78-OFCC-13

FILED
DEC. 4, 19
RICHARD H. D
CLERK, U.S. COURT O

Before: BURTON S. STERNBURG
Administrative Law Judge

ADVISORY DECISION No. 74-295.

Statement of the Case

This is a proceeding instituted under the provisions of Executive Order 11246, as amended, 3 CFR 339 and the applicable regulations issued thereunder, 41 CFR Chapter 60 *et seq.*

On August 29, 1978, Weldon J. Rougeau, Director of the Office of Federal Contract Compliance Programs (OFCCP) issued a Notice of Hearing wherein he directed that a hearing be held for purposes of taking oral argument and accepting affidavits with respect to two issues involved in a compliance review of the Affirmative Action Program for Firestone Synthetic Latex and Rubber Company's facility in Orange, Texas. The issues were described in the Notice as follows:

(1) assuming no dispute as to availability under 41 CFR 60-2.11(b)(1)(i)—(viii) [or, as appropriate 2.11(b)(2)(i)-(vii)], when must underutilization be declared under 41 CFR 60.211(b)?

(2) if underutilization is declared, when must goals be established under 41 CFR 60-2.12?

By a letter dated September 15, 1978, in response to Firestone's third request for a "substantial question of law or fact" hearing pursuant to 41 CFR 60-2.2(b) of the regulations, the Director of OFCCP gave Firestone permission to brief a third issue, i.e. "whether the Constitution prohibits the Federal Government from imposing goals on its contractors in the absence of a finding of discrimination."

On October 31, 1978, following the dissolution of a temporary restraining order issued by the U.S. District Court for the Eastern District of Texas, Beaumont Division, a hearing was held in the captioned matter in Washington, D.C. In accordance with the provisions of the notice of hearing, the parties were afforded thirty minute arguments and the opportunity to submit briefs and affidavits in support of their respective positions.

Subsequently on November 3, 1978, after the close of the hearing, the Director of OFCCP, in an apparent attempt to settle a dispute which arose at the hearing concerning the type of decision to be rendered, directed a letter of clarification to the undersigned with copies to all parties. The letter reads in pertinent part as follows:

> . . . the purpose of this preliminary informational and advisory hearing currently pending before you is to assist me in determining whether to grant or deny the substantial issue request. In that regard, your findings concerning the two issues enumerated in my August 29, 1978, Notice of Hearing are to be directed towards determining whether Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12. Such review includes whether Firestone was aware of the requirements prior to entering into current Government contracts. You are not, however, to attempt to resolve the argument by ultimately recommending whether Firestone's or the Government's interpretations, in the abstract, are correct because this is not a 41 CFR 60-2.2(b) substantial issues hearing.

Following the issuance of the aforementioned letter, both parties declined the opportunity for further oral argument and opted instead to submit briefs and affidavits in support of their respective positions.

FINDINGS OF FACT[1]

Firestone Synthetic Rubber and Latex Company (hereinafter "Firestone") is a Government contractor subject to the requirements of Executive Order 11246; as amended, and the implementing regulations issued pursuant thereto at 41 CFR Chapter 60. (See p. 1 of Memorandum in Support of Motion for Consideration of Additional Issues, for Allowance of Discovery, and for Continuance filed by Firestone in this Court on October 23, 1978).

On November 19, 1976, Firestone entered into Contract No. DAA EO 776 C3561 with the United States Army in the amount of $1,760,226. (See paragraph 3 of the October 2, 1978, Affidavit of Katherine A. Baldwin, hereinafter "Baldwin Affidavit No. 1," filed with the Brief of the Office of the Solicitor in this Court on October 2, 1978).

Firestone, at all times material to this dispute, has employed more than 50 persons at its Orange, Texas facility. (See p. 1 of Attachment to Appendix B of Baldwin Affidavit No. 1).

Prior to November 1977, in conducting utilization analyses for the Affirmative Action Program (AAP) at its Orange, Texas

[1] There is no dispute with respect to the facts which are based upon the admissions of the parties and the affidavits of Katherine Baldwin and attachments thereto.

facility, Firestone declared underutilization in accordance with the Secretary's regulation at 41 CFR 60-2.11(b) and the Director of OFCCP's standard, *i.e.*, whenever the availability percentages for women or minorities in a given job group exceeded Firestone's actual utilization of such persons. Whenever underutilization for minorities or women exceeded half of a person for a given job group, Firestone set goals in accordance with the Secretary's regulation at 41 CFR 60-2.12. (See November 17, 1978 affidavit of Katherine A. Baldwin, filed with this Court November 20, 1978, hereinafter "Baldwin Affidavit No. 2").

On November 8-10, 1977, the Department of Energy conducted an on-site compliance review, pursuant to 41 CFR 60-1.20(c), of Firestone's Orange, Texas facility. During the review, DOE's compliance officer, Mr. Cordova, informed Firestone officials that the 1977 and 1978 Affirmative Action Programs for its Orange facility failed to meet the requirements of Executive Order 11246, as amended, and the regulations promulgated thereunder, because of inadequacies in Firestone's utilization analysis required by 41 CFR 60-2.11. At that time, Firestone agreed to revise its utilization analysis and subsequently, by letters dated November 22, 1977, and December 15, 1977, submitted a revised utilization analysis. (See Attachments 1 and 2 to Appendix A of Baldwin Affidavit No. 1).

On January 30, 1978, Firestone submitted its revised 1978 AAP, including goals and timetables for job groups for which Firestone had declared underutilization. However, Firestone did not declare underutilization or set goals whenever the availability of women or minorities exceeded Firestone's actual utilization of such persons in a given job group but rather, it declared underutilization by using the standard deviation method of statistical significance at the 5% level.

On February 2, 1978, Mr. Cordova, having reviewed the revised 1978 AAP, advised Firestone by letter that the AAP did

not meet the requirements of 41 CFR Part 60-2. The "AAP Review Findings," which were attached to the February 2, 1978 letter, identified Firestone's job group analysis as one of two deficient areas. The utilization analysis was found unacceptable because underutilization was declared by Firestone only in those situations where the difference between the "expected number" and the "observed number" of minorities or women was statistically significant at the 5% level. (See Appendix B of Baldwin Affidavit No. 1).

In the "AAP Review Findings" attached to the February 2, 1978 letter to Firestone, Mr. Cordova set forth the OFCCP standard for determining the existence of underutilization. Firestone was advised to use the underutilization standard prescribed by OFCCP, i.e., to revise its AAP to "specifically state that underutilization exists for every job group where the percentage of [minorities and women] employed in a job group is less than the percentage of persons available in that job group." (See p. 4 of Appendix B of Baldwin Affidavit No. 1).

On February 16, 1978, Firestone and Department of Energy representatives met to discuss Mr. Cordova's "AAP Review Findings" of February 2, 1978. Although Firestone agreed to submit a 1978 AAP with supplemental revisions, it did not agree to declare underutilization for every job group where the percentage of minorities and women employed was less than their availability. (See p. 4 of the Brief of the United States Department of Labor, filed October 2, 1978.)

On February 27, 1978, Firestone requested a substantial issues determination and a hearing from the Director of OFCCP, Weldon J. Rougeau, pursuant to 41 CFR 60-2.2(b). Firestone, in its letter to the Director, explained that it had not declared underutilization in the several job groups at its Orange, Texas facility where the disparity between availability and current utilization was not significant at the 5% level. (See Appendix A of Baldwin Affidavit No. 1.)

On May 15, 1978, the Director of OFCCP denied Firestone's request for a substantial issues determination, citing Firestone's failure to follow OFCCP's interpretation of 41 CFR 60-2.11(b) in conducting a utilization analysis. The Director granted Firestone thirty (30) days in which to complete a utilization analysis which complied with the regulations. He also expressed his willingness to consider further evidence, if after conducting the proper utilization analysis, Firestone continued to dispute DOE's requirements with respect to utilization analyses. (See Appendix C of Baldwin Affidavit No. 1.)

In his May 15, 1978, letter denying Firestone's substantial issues request, the Director explained to Firestone that "underutilization" as used in 41 CFR 60-2.11(b), "merely means that there is a numerical disparity between availability and utilization. If such a disparity exists, the contractor is required under 41 CFR 60-2.12 to construct goals and timetables, regardless of whether or not it has ever discriminated in employment." (See Appendix C of Baldwin Affidavit No. 1.) Two examples attesting to OFCCP's position on underutilization were cited, the relevant portions excerpted and copies enclosed for Firestone's information. The first cited example, "Technical Guidance Memo No. 1 on Revised Order No. 4," was issued to "All Contract Compliance Officers" by the Director of OFCCP on February 22, 1974. The second example cited was a November 13, 1974, letter explaining underutilization from Under Secretary of Labor Schubert to Frank Carlucci, Under Secretary of the Department of Health, Education and Welfare. (See Attachments 1 and 2 of Appendix C of Baldwin Affidavit No. 1.)

On June 29, 1978, DOE representatives met with Firestone to discuss the remaining unresolved issues regarding the revised 1978 AAP for the Orange, Texas, facility. At the meeting, Firestone was informed that on the issue of underutilization, OFCCP would not vary from the underutilization standard expressed by the Director of the OFCCP in "Technical Guidance Memo No. 1 on Revised Order No. 4," the letter of November 13, 1974 from Mr. Schubert to HEW, and Mr. Rougeau's May 15, 1978 letter. (See Appendix D of Baldwin Affidavit No. 1.)

On July 3, 1978, Firestone again requested a determination from Mr. Rougeau that a substantial question of law existed with respect to the proper standard of underutilization. (See Appendix D of Baldwin Affidavit No. 1.)

On August 15, 1978, DOE issued a notice to Firestone pursuant to 41 CFR 60-1.28, giving it 30 days to show cause why enforcement proceedings under the Executive Order should not be instituted. Among the deficiencies listed was the continued failure of Firestone to identify underutilization in its 1978 revised AAP for every job group where the percentage of minorities or women employed in the job group was less than the percentage available for that group. Examples of job groups in which Firestone improperly failed to identify underutilization were cited, and in recommending corrective action, the findings provided sample calculations how underutilization should be determined in accordance with the OFCCP standard. The revised 1978 AAP minority and female goals for the Orange, Texas facility were also found unacceptable. As corrective action, Firestone was told to establish annual numerical and percentage goals for each underutilized job group. (See pp. 2-3, 5 of enclosure to Appendix E to Baldwin Affidavit No. 1.)

DISCUSSION AND CONCLUSIONS

Firestone takes the position that substantial factual and legal questions exist with respect to the manner and method utilized by the Director of the OFCCP in determining underutilization. In support of this position Firestone points out that "availability data" is not predicated on any particular scientific

approach but rather on a negotiated agreement between representatives of the contractors involved and OFCCP. In view of the unreliability of such "availability data" Firestone argues that it is not reasonable to declare "underutilization" when there is a disparity between "availability data" with respect to minorities or women and the presence of such persons actually on the contractors payroll. According to Firestone a more reasonable approach would be to declare "underutilization" only when the difference between availability of minorities or women and their current employment rate is statistically significant at the "5% level of significance." In support of its position in this regard, Firestone cites the decision of the Supreme Court in *Hazelwood School District* v. *United States,* 97 S.Ct. 2736(1977). Firestone further argues, that irrespective of what test is used to determine underutilization, in the absence of a finding of discrimination, the imposition of goals and timetables to rectify any disparity between availability and employment is unconstitutional. In this latter respect, Firestone relies in the main on the court's decisions in *Weber* v. *Kaiser Aluminum and Chemical Corporation* 563 F.2d 216 (5th Cir. 1977), *cert. pending,* U.S.L.W. 3168 (1978); *Regents of the University of California* v. *Bakke,* 98 S.Ct. 2733.

The Government on the other hand takes the position that there are no substantial questions of fact or law in that (1) Firestone was or should have been aware of the consistent position of OFCCP with respect to when underutilization is to be declared; (2) the declaration of underutilization when there is a difference of one-half of one person between availability and employment is not unreasonable since it comports with the intentions of the Executive Order; (3) the Executive Order is not controlled by Title VII and therefore it need not comport with the "5% level of significance" utilized therein for purposes of establishing discrimination; and (4) the establishment of flexible goals and timetables, absent a finding of discrimination, is not unconstitutional.

As more fully set forth in the Director's November 3, 1978, letter of clarification, my function in the instant proceeding is to render an advisory opinion with respect to whether or not Firestone has a substantial justifiable argument regarding its contractual obligation to develop a utilization analysis and to establish goals and timetables in accordance with the regulatory standards set out in 41 CFR 60-2.11(b) and 41 CFR 60-2.12.

The facts, which are not in dispute, indicate that Firestone was at all times aware of the requirements of the Order, the regulations and the OFCCP's interpretations and application of same. In fact for the first few years of the current contract Firestone did adhere to and follow the position currently urged by OFCCP. Accordingly, there does not appear to be any substantial issue of fact warranting a full factual hearing under the regulations.

With respect to whether or not the method utilized by OFCCP in determining underutilization is "reasonable," Firestone relies in the main on various court cases involving Title VII of the 1964 Civil Rights Act, as amended.

Firestone admits, and I so find, that the Executive Order has the force and effect of law. *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, cert. denied, 404 U.S. 84. (See also cases cited on page 10 of the Government's pre-hearing brief.) In these circumstances and considering the legislative history of Title VII, particularly the 1972 debates thereon, it is clear that there was no intent to limit the Executive Order and make it subordinate to, or controlled by, Title VII. The debates, etc., indicate that enforcement of the Executive Order was to be separate and apart from Title VII and that the Order was to be the vehicle for insuring that Government contractors would develop affirmative action programs that would allow for all citizens to share equally in the jobs generated by Government contracts. (See 118 Congressional Record 1385, Remarks of Senator Saxbe.)

Inasmuch as attempts to merge the Executive Order and Title VII were defeated during the 1972 debates it follows that the tests applied in determining discrimination under Title VII are not controlling in determining underutilization under the Executive Order. Accordingly, the mere fact that the 5% standard of significance utilized in Title VII cases for purposes of establishing prima-facie cases of discrimination has received court approval does not make such standard of underutilization a more reasonable one than the discrepancy of ½ of one person utilized by OFCCP in declaring underutilization. This is particularly true in view of the purposes of the respective pieces of legislation. Thus, Title VII is designed to prevent and remedy discrimination, while the Executive Order is designed to foster job opportunities for all people in proportion to their availability irrespective of a finding of discrimination. This is a significant distinction. In view of the foregoing and considering the different objectives of the respective pieces of legislation, it does not appear that Firestone's argument relative to the reasonableness of the OFCCP's standard for declaring underutilization warrants the substantial issues hearing urged by Firestone.[2]

Lastly, with regard to the constitutionality or legality of the goals and timetables approach, as noted supra, Firestone takes the position that such goals and timetables are indeed quotas and, absent a showing of discrimination, are unconstitutional. In support of its position in this latter respect, Firestone cites *Weber* v. *Kaiser Aluminum and Chemical Corporation* and *Regents of the University of California* v. *Bakke, supra*, wherein the courts have indicated that establishment of racial quotas in

[2] In reaching this conclusion, I have not ignored the alleged unscientific method utilized in arriving at the availability figures. However, inasmuch as such figure is a product of negotiation between the parties and not an arbitrary determination by OFCCP, I fail to see why Firestone should be allowed a 5% deviation from such figure. Had Firestone disagreed with the availability figure, then a substantial issue determination might well have been in order at that time.

the absence of a finding of discrimination are unconstitutional. The Government however, would distinguish those cases which arose under Title VII on the ground that the affirmative action programs arising under the Executive Order do not establish "quotas" but rather flexible goals. According to the Government, "Where good faith efforts have been made, a contractor may not be sanctioned for its failure to fully utilize minorities or women."

A reading of the regulations, particularly Section 60-2.12, supports the Government's position that the goals are flexible. Thus, Section 60-2.12(e) states that

> Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

Since the above cited regulation specifically makes the "goal" something less than a "quota" it would appear that affirmative action plans formulated under the Executive Order without a prior finding of discrimination are not unconstitutional. Further support for such conclusion is found in the regulations as whole. Thus the regulations make it clear that the goals should be significant, measurable, attainable, specific for planned results with timetables for completion. The regulations caution that they are not intended to, and should not, be used to discriminate against any applicant or employee because of color, religion, sex or natural origin.

In view of the foregoing considerations, it does not appear that the goals and timetables approach is designed to reach the level of a quota. An affirmative action plan which rises to such level would of course be contrary to the regulations and, upon the basis of the court cases cited by Firestone, unconstitutional.

On the other hand, it is difficult to imagine how a contractor could reach the goals set forth in an affirmative action plan, all things being equal, without according some

preference in hire to minorities and women. According such preferences to minorities and women narrows and to some extent destroys the distinction between flIxible goals and quotas.

Inasmuch as the *Bakke* and *Kaiser Aluminum* cases, *supra*, as well as the Government's petition for certiorari in *Kaiser Aluminum*[3] indicate that the establishment of quotas and/or preferences absent a finding of discrimination may be illegal, it appears that a substantial question of law does exist with respect to whether the imposition of goals and timetables under Executive Order 11246, absent a finding of discrimination, conflicts with the Constitution and Title VII.

BURTON S. STERNBURG
Administrative Law Judge

Dated: December 8, 1978
Washington, D.C.

[3] In the petition the Government states: "Bakke teaches that the legality of an affirmative action program may turn on the presence of governmental findings of discrimination by the employer and the degree of governmental participation in developing the affirmative action plan."

APPENDIX VIII

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Photocopy of the first page of the decision of the court appears below.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAL AID SOCIETY OF ALAMEDA COUNTY;
EPHEN E. RONFELDT; LINDA CASTILLO;
ORES LUSTER; JOHN STAFFORD; ISADORE
NE; WESTERN REGIONAL JOB COUNCIL,

Plaintiffs-Appellees,

ER J. BRENNAN, Secretary of the
ted States Department of Labor;
LIP DAVIS, Acting Director of the
ice of Federal Contract Compliance;
L L. BUTZ, Secretary of the United
tes Department of Agriculture;
LIAM GLADDEN, Chief, Contract
pliance Division, Office of Equal
ortunity, United States Department
Agriculture,

Defendants,

MBER OF COMMERCE OF THE UNITED
TES OF AMERICA, on behalf of its
ected members,

Defendant-Intervenors-Appellants;

FILED

DEC 4 1979

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

No. 74-2954